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R U L E S A N D P R A C T I C E

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O F T H E

*EXCHEQUER IN IRELAND;*

W I T H T H E

S e v e r a l S t a t u t e s r e l a t i v e t h e r e t o .

A S A L S O

Several Adjudged Cases on the Practice in Courts of Equity, both in  
*England and Ireland*; with the Reasons and Origin thereof in many  
Instances as they arose from the Civil Law of the *Romans*, or the  
Canon and Feudal Laws;

A N D A

C O M P L E A T I N D E X T O T H E W H O L E .

T H E S E C O N D E D I T I O N .

B Y G O R G E S E D M O N D H O W A R D, E S Q.

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V O L . II.

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D U B L I N :

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# T R E A T I S E, &c.

## Feme Covert.

\* 465

FEME COVERTS are married women; and husband Feme Covert, and wife, must join in suit for things merely in action, belonging to the wife. 1 Ch. Ca. 41.

But sometimes the wife by her *prochein amy*, or next friend, sues her husband in this court, as where she sues\* him for performance of a marriage settlement, or the like. And sometimes she petitions against him, or sues him here for alimony, as where he turns her away, or where she goes away upon ill usage: Also a *Feme Covert* hath been allowed to sue in her own name, when her husband was beyond sea: So in case where a husband released his wife's debt.

In what cases  
she may sue se-  
parate from her  
husband.

\* 466

A *Feme Covert*, who has a separate maintenance, may sue alone; so may a wife whose husband is banished by act of parliament, and may act in every thing as a *Feme Sole*. 1 Ch. Ca. 35. 2 Vern. 104.

If the wife answers, and the husband stands out all process of contempt, the bill can be taken *pro confesso*, against the husband only. So where a wife by combination refused to join with her husband in a plea, the plea was ordered to stand as for the husband, and the plaintiff to proceed against the wife. 1 Ch. Ca. 296. 2 Ch. Ca. 173.

So if the wife refuses to join in a plea, it shall stand as for the husband only.

The wife re-  
fusing to an-  
swer, the bill  
can be taken  
*pro confesso*,  
as  
against the hus-  
band only.

## *Fines on Sheriffs.*

A *Feme Covert* must answer alone; if husband be not amenable.

\* 467  
Wife's answer different from the husband, shall not prejudice him.

Though the matter only concerns the wife, yet both must be served with process.

Where a wife answers separate from her husband, there must be an order for that purpose.

A *Feme Covert* must answer alone, if the husband is not amenable, or an attachment will be granted against her. 2 *Vern.* 613.

\* Though the wife's answer differs from the husband's, yet it shall not prejudice him, for she can be no witness against him. 2 *Vern.* 79.

Where a wife is defendant, you cannot regularly serve the wife with process to answer, without serving the husband also, though the matter in question concerns the wife only,

But frequently the wife is put to answer alone, when the husband is beyond sea; but there must be an order obtained for the wife to put in and swear her answer separate from her husband, which the court will grant upon counsel's motion. So where she lives separate from her husband, she is often ordered to answer alone; but if she answers alone, without leave of the court, the answer will be suppressed upon motion. 1 *Ch. Rep.* 68.

For more on this subject, see *Title Answers, &c.*

\* 468

## *\* Fines on Sheriffs.*

RULE.  
Fines imposed, not to be taken off, but on cause shewn and costs paid.

RULE.  
Attachment to the pursuivant against a sheriff, after two fines are imposed in all cases.

BY the 72d general rule, no fines upon the averment are to be taken off, but upon certificate of the attorney, that the costs of imposing such fines are paid, and good cause appearing to the court, for taking off such fines.

By the 73d general rule, where a sheriff doth not bring in the defendant's body upon a *cepi*, or bring in money according to his return, or doth not return his writ or process, affidavit being filed of the delivery thereof, that in all such cases, after two fines are imposed by the court, an attachment to the pursuivant shall issue of course, first taking out an order for the same, which is to mention the said respective fines and the time of entering each rule.

## Hearing.

On the 28th of November 1752, it was ordered as a general rule, that for the future, no fines imposed on sheriffs for not returning writs directed to them, shall be reduced, unless an affidavit be produced assigning a sufficient cause wherefore they delayed returning the same.

RULE.  
Fines imposed  
on sheriffs, for  
not returning  
writs, not to be  
reduced, but on  
good cause shewn by affidavit.

## \* Hearing.

\* 469

AFTER publication had passed at the civil law, the last act, *quod* the proof, was the *conclusio causæ*, which was concluding in fact, and there was an instance of either party to the judge, that either party should renounce all further proof, and if the party did renounce the proof, there was a conclusion; but if he did not shew any cause why he should not, for his contumacy in not renouncing, the conclusion was taken *pro confesso*: But this is not of the essence of the process; *Conclusio non est de Substantia, sed potius ex quadam Confuetudine, unde si obmittatur non vitiat processum; tantum magis in causis sumariis in quibus de necessitate non requiritur.* Vide, Gail, 189, Marant. 148. 427.

The method of  
hearing causes  
at the civil law.

And after the conclusion in the cause, they moved, or petitioned the judge to set down the cause to be heard, which they called *ad allegandum in jure*; and then there was a citation to the defendant to appear at that day, and upon proof of the service of that citation, and reading his answer, and proofs in the cause, if he did not appear, the advocate for the plaintiff first argued \* and then the advocate for the defendant, and thereupon sentence was given. Ibidem.

\* 470

But in courts of equity there is no such proceeding as And in courts the *conclusio causæ*; for as soon as publication is passed, the court, upon application of the plaintiff, will appoint a day *ad audiendum sententiam*.

*And hearings are on,*  
*First, bill, answer, pleadings and proofs.*

The several  
sorts of hearings.

*Second, bill, answer, and pleadings, without proofs.*

*Third, bill and answer.*

*Fourth, bill to be taken *pro confesso*.*

*Fifth.*

## Hearing.

*Fifth*, on the officer's report, and the merits, where an account has been decreed, which see under *Title Account*.

*Sixth*, on the verdict and merits, where an issue has been directed at law, which see, under *Title Orders*.

*Seventh*, hearing, *ad requisitionem defendantis*.

And first, of hearing, on bill, answer, pleading and proof.

**RULE.**  
Publication of  
the depositions.

\* 471

By the 45th general rule, when witnesses are examined, the first rule for publication is to be moved of course \* by an attorney, without notice; and upon this motion, the court will grant a conditional order to shew cause, in four days, why publication should not be granted, and an attested copy of this order is to be served on the adverse attorney; and when the time for shewing cause is expired, the court, upon an attorney's motion, and upon producing the last order, an affidavit of the service thereof, and a certificate of no cause being shewn why publication should not pass, will make the rule for publication absolute.

And publication  
where the plain-  
tiff only ex-  
amines.

So likewise, when the plaintiff hath finished his examination either by commission or in town, and when the defendant hath let a vacation pass without examining any witnesses on his side, the plaintiff's attorney may, on the first day of the next term, after such vacation, move the first rule for publication, and proceed to make it absolute, as above: But note, the short vacation after *Easter* term, is never accounted a vacation to examine in.

Of the setting  
down the cause  
to be heard,  
and serving sub-  
poena to hear  
judgment.

\* 472

And when publication is passed, if it be before, or on the essoin day of term, the plaintiff's attorney may move, to have the cause set down to be heard, on some day in term: or if publication be passed after the essoin day, then in the sittings after the term; and the \* court will make an order for that purpose, which order is to be served on the opposite attorney, four days before the day appointed for the hearing, exclusive of the day on which it is served; and when the day of hearing is appointed, the plaintiff's attorney is to give a note of the cause, to the chief remembrancer, with a brief account of the nature of it; and then (unless there be an order on the defendant, to appear *gratis*.) he is to take out a *subpoena ad audiendum judicium*, returnable at a day certain, which is to be served eight days before the day of hearing. For the manner of service, see *Title Process*.

Ibidem.

If there be such an order on the defendant, to appear *gratis*, then the defendant's attorney is to be served with the order for hearing only.

And

## Hearing.

And this citation to hear judgment, is made according to The subpoena to the notion of the civil law, that no act of court may be made, hear judgment, parte in auditâ alterâ; and the service is made eight days before is according to the day appointed for hearing, that the party may have time the notion of to take out the depositions, and prepare his counsel. the civil law.

When the day of hearing is come, if the plaintiff and defendant attend, the plaintiff's counsel is first to open the bill, and a counsel for the defendant \* opens his answer; then the case on both sides is to be stated and argued; and thereupon, and upon reading the proofs, the court proceed to give judgment.

Hearing.

\* 473

But note, that no cause will be admitted to be brought to hearing, unless the order for setting the same down, called the order for the day, be taken out, and produced to the court.

Order of the day to be produced on the hearing.

There may also be several other orders conceived, in the progress of the cause, which are requisite to be produced on the hearing, and without which, the court in some cases will not proceed: As orders to revive, where there has been an abatement; for striking parties out of the bill; that the defendant shall appear *gratis*, upon the hearing; for taking the answer of a *Feme Covert*, separate from her husband; for appointing a guardian for a minor, to appear and answer for him; orders on consents, for reading deeds, &c. on the hearing as proved; for suffering no conditional decree; and such like: Which an attorney or agent, must be especially careful to have ready to produce to the court, as they shall be needed. If he duly makes his entries, in his books, or regularly keeps his bills of cost, they will be of great use to him upon this occasion.

Other orders which may be requisite to be produced on the hearing.

\* The method of setting down causes now, is not according to the priority of publication, as it was formerly: For now, before the beginning of each term, the chief remembrancer enters in the book of notes, all the causes unheard the precedent term.

Method of setting down causes to be heard.

\* 474

And the attorneys in the vacation, give the officer a note of ibidem, all the causes for the ensuing term, with a brief account of the nature of each cause; which being entered after the adjourned causes, the officer makes a list of them, which is delivered to the judges, and after the list is prepared, no cause is admitted to be after set down for that term.

Second.

## Hearing.

### Second. Of Hearing upon Bill, Answer and Pleadings without Proofs.

Hearing on bill  
and answer, the  
answer to be  
taken as true  
in all points.

\* 475

**I**N many cases, though the cause requires no witnesses to be examined, yet it may be necessary for the plaintiff to reply, whereby the defendant will be put upon proof of his answer, and the plaintiff admitted to prove the matters of his bill; for should the cause be heard upon bill and answer, the plaintiff must take the defendant's answer, \* to be true in all points. And if the plaintiff replies to an answer, and without rejoinder, or rules, brings the cause to a hearing, the answer shall be taken to be wholly true, as if there had been no replication; for the opportunity which the defendant had of proving his answer, is taken from him. See 2 Chap. Ca. 21. See the rule, P. 478.

**S**ubpoena to rejoin not served, &c. though sued out, yet cause may be heard on bill and answer.

How the plaintiff is to proceed to hearing, on the pleadings where he hath no witnesses to examine, in case the defendant does or doth not rejoin.

\* 476

Where a plaintiff hath reply'd, and would have the cause heard upon the pleadings, he may forthwith serve the defendant with a subpoena to rejoin, and upon affidavit of the service thereof, and upon motion of his attorney thereon, he may obtain an order for the defendant to rejoin in four days: And whether the defendant does, or does not rejoin, the plaintiff's attorney may move of course, and without an affidavit of the service of the rule to rejoin, that the defendant may examine his witnesses, the following vacation, or that the cause may be heard in the next term, on the pleadings, and the court will grant such an order, and this order is to be forthwith served upon the defendant's attorney; and if the defendant examines no witnesses, the plaintiff's attorney may, the next term, on affidavit of the service of the said order, and on motion thereon, obtain an order, for setting down the cause, to be heard on some day in the term, if this motion be made on the essein day, if afterwards, in the sittings after term, or in some day in the next term.

And where the defendant is to rejoin gratis.

But if the defendant be under an obligation to rejoin gratis, the plaintiff need not in this case serve the defendant with a subpoena to rejoin, but may immediately when he has reply'd, put a rule on the defendant to examine his witnesses as aforesaid.

If the defendant examines, plaintiff to proceed to hearing aforesaid.

If witnesses be examined by the defendant, the plaintiff may after publication of the depositions, set down the cause for hearing as is before directed.

Where

## Hearing.

Where there are several defendants in a cause, and that the plaintiff is not inclined to examine witnesses, as to some of them, but to hear the cause as to those upon the pleadings, in this case, a motion is to be made by the plaintiff's attorney, that the cause may be heard as to such defendants, upon the pleadings; at the same time that it is heard against the other defendants, upon the pleadings and proofs.

\* 477  
RULE 47th.  
Witnesses examined and no more proved than is confessed by the answer.

\* By the 47th general rule, if in any cause, the plaintiff shall proceed to examine witnesses, and shall prove no more than what is confessed by answer, so that he might have gone to hearing on the pleadings, in that case, although he obtain a decree, yet he shall pay the defendant the costs expended after his answer.

Answer, plaintiff to pay the costs after answer, though he obtain a decree.

## Third. Of Hearing upon Bill and Answer.

WHEN the plaintiff finds sufficient matter of equity confessed in the defendant's answer, whereupon to ground a decree without further proof, he may proceed to set down the cause for hearing upon bill and answer, and without putting any rule upon the defendant to examine.

Hearing upon bill and answer where sufficient equity is confessed.

And after the plaintiff hath filed a replication, if he be inclined to have the cause heard upon the bill and answer, the court, upon motion of the plaintiff's attorney, will give leave to withdraw the replication, and proceed to hearing on the bill and answer.

Replication may be withdrawn and the cause heard on bill and answer.

\* 478

By the 48th general rule, if a hearing be prayed on bill and answer, the answer must be admitted to be true in all points, and no other evidence admitted; unless it be matter of record, to which the answer particularly refers, and is provable by the record: But in case the court shall find no ground for giving the decree thereon, the bill is to be dismissed with costs, or the plaintiff, (if he desires it) may be admitted to reply, he first giving the defendant, or his attorney, forty shillings costs; which if he pays not within four days after hearing, then the dismiss is to stand, and the order is to be entered and taken out accordingly.

RULE 48.  
Hearing on bill and answer, the answer to be taken as true in all points.

And if no decree can be given thereon, the bill is to be dismissed with costs or plaintiff may reply, first paying forty shillings costs.

## Hearing.

No deed to be  
read on the  
hearing, unless  
issue be joined.

Upon a demur-  
rer at the hear-  
ing for want of  
parties or plea  
of outlawry,  
how the plain-  
tiff is to bring  
the cause on a  
gain, and what  
cost he is to pay,

\* 479

It is said, that no deed will be admitted to be read on the hearing in any cause, where issue is not joined.

Upon a demurrer at the hearing for want of parties, if it be allowed, the court will order the cause to stand over, with liberty for the plaintiff to amend his bill, and that he shall pay the cost of the day. And in all cases, where the cause stands over for want of parties, when the plaintiff hath amended his bill, and that the party \* who was added hath answered, and the plaintiff hath paid the costs of the day, and hath proceeded upon the amendment as to the other defendants, as is usual on amending bills, his attorney may then, (without producing the last order) move of course, for liberty to set down the cause, to be heard on bill and answer, as to the new-added defendants, and to be further heard as to the former defendants, and the court will make an order for that purpose; and the plaintiff is to serve the order on the former parties, four days before the day appointed for the hearing, and exclusive of the day of service, and is to serve the added parties with *subpoena to hear judgment*, and may then proceed to hearing as usual. *Sed vide Moseley's Rep. 226*; where it is said, the former defendants must be also served with *subpoena*, to hear judgment.

If there be a replication and rejoinder, or proofs in the cause, the order must be, that the cause shall be further heard against the other defendants on the pleadings, or on the pleadings and proofs, as the case is.

How to proceed  
after the outlawry  
reversed.

\* 480

As also upon a plea of outlawry at the hearing, after the plaintiff hath reversed the outlawry, and paid the costs\* of the day, he may move by his attorney, to set down the cause to be further heard, and proceed as usual.

The costs to be  
paid in either  
case.

And in either of these cases, the costs to be paid by the plaintiff, are the same as upon dismisses, for not appearing on the hearing. See Pa. 393. *Title Dismiss.*

The court on  
want of parties,  
may either dis-  
miss the bill  
without prejudice, or give leave to amend.

Where a bill wants proper parties, it is in the power of the court to dismiss the bill without prejudice, or to give leave to amend, paying costs. *1. Williams, 428.*

## Hearing.

### Fourth. Of Hearings upon Bills to be taken pro confesso.

It has been already said, that according to the ancient civil law, when the libel was preferred to the judge, it was also delivered to the defendant or *Reus*, and if he did not answer in ten days they had the *editum primum*, and after ten days more, if the answer did not come in, they had had the *editum secundum*, and in ten days more, they had the *editum peremptorium*: And if he did not come in and answer in ten days more, judgment was pronounced upon him, as if he was absent; and these were called the several *dilations* that were given the defendant to answer: But after the provincial judges were settled, then came in the code to a new regulation, which was, that after the defendant was cited, the plaintiff was to give caution to end his suit in two months, and then he was likewise to deliver a copy of the libel to the *Reus*, who subscribed the note of the time when such libel was delivered, and then there was a term of twenty days given the defendant, in which time he was to put in his answer; and if he did not, sentence was given as if the answer was put in; for they looked upon the subscribing the time of receiving the libel, as a submission to contest within the twenty days, and the twenty days were reckoned as a time of deliberation, whether he would yield to his adversary, or contend in judgment; and therefore if the libel was delivered, and the subscription demanded, and the actor proved this, and the twenty days were out, then the defendant was presumed to acquiesce. *De judiciis, Lib. 5. tit. 1. Law. 72. Code Lib. 3. Tit. 9 Verb aufertur, Novel. 53. Cap. 3.*

The method of proceeding at the civil law, to take the libel as confessed, where the defendant or *Reus* did not answer it.

\* 481

And by *Maranta's* practice of the civil, and canon law, 262; And how the defendant, for refusing to answer before \* the judge, was sentence was ex-  
deemed contumacious, and his punishment is thus expressed: pressed.  
*Vigesima pana est quia contumax qui non vult respondere coram Judice  
habetur pro negante vel confiteente secundum quod est ei magis praefu-  
sium, pars 6 de contumacia, 32.*

\* 482

So in this court, where a person is served with a *subpoena*, and appears thereupon, but neglects to answer, and process issues against him to a sequestration, the plaintiff's attorney may, upon motion to the court, upon the sequestration and return, obtain an order for setting down the cause to be heard, to have the bill taken *pro confesso*: And if the defendant neglects to appear, the plaintiff's attorney may in like manner set down the cause, and by a late statute the court will appoint an attorney to appear for the defendant. See pa. 491.

The proceedings much the same in courts of equity, and in what case the cause shall be set down to be heard to have the bill taken as confessed.

And

## Hearing.

The plaintiff in  
this case need  
not serve a sub-  
pœna to hear  
judgment.

And in this case, there is no occasion to serve either the party, or his house, or last place of abode with a *subpœna* to hear judgment, in regard the party is in contempt, and is being returned upon the process, That the defendant is not to be found, and upon the sequestration that he hath no goods, he is supposed not to be found any where, so as to be served with a *subpœna* to hear judgment.

This practice  
not of long  
standing.  
The plaintiff's  
bill formerly  
proved by wit-  
nesses *viva voce*.

\* 483

\* The practice of taking bills *pro confesso* is not of long standing, the ancient way being to put the plaintiff to make proof of the substance of the bill by witnesses *viva voce*, although the defendant had stood out to the last process, a sequestration: And so every plaintiff at law was put to prove his declaration, as appears by these words *Et inde producit sectam*, where *secunda* signifies the witnesses. 1 *Vern.* 224. *Mosley's Rep.* 386.

Why disfused.

But this practice was disfused, because the plaintiff often comes into equity, because he cannot prove his case, but by the discovery of the defendant. *Ibidem*. But then the bill was read in open court, lest an inconsistent decree should be passed.

The conse-  
quences of the pre-  
sent order to the  
defendant.

In 1 *Vern.* 247. *Gibson against Sevengton*, the court appeared to be in doubt, whether it should grant such an order, for that the consequence of it is extraordinary, to take every thing for granted, which the fruitful fancy of a counsel could invent or put into a bill and make all pass for truth.

The reason of  
the order.

\* 484

The reason of this order must be, that the defendant appearing, and refusing to put in any answer at all, the plaintiff is by that means rendered \* incapable of joining issue, and deprived of the opportunity of examining any witnesses. 2 *William* 558. *Hawkins against Crook*.

Analogous to a  
judgment at  
law by nihil di-  
citur.

And this method of taking a bill *pro confesso*, is consonant also to the rules and practice of courts at law, where, if the defendant makes default by *nihil dicit*, judgment is immediately given in debt, or in all cases where the thing demanded is certain; but where the matter sued for, consists in damages, a judgment interlocutory is given, after which a writ of enquiry goes to ascertain the damages, and then follows judgment final. *Ibidem*.

Formerly a bill  
could not be ta-  
ken *pro confesso*, where the  
defendant had  
time to answer,  
though the an-  
swer was re-  
ported short.

And in the above mentioned case of *Hawkins and Crook*, on an appeal to the lord chancellor *King*, from the master of the rolls, it was determined, That as time was given the defendant to answer, though after a sequestration, and though the answer was reported short, yet the bill could not be presumed to be true for want of an answer, when by the records of the court there appeared to be an answer, (and admitted by the plain-

## Hearings.

till by his taking exceptions) and when several material parts of the bill were denied by the answer. 2 *Williams* 556. But this practice *Mosely's Rep.* 389. But the practice now is quite otherwife; is now altered. \* 485  
for although the answer be short in one point only, and all other parts of the bill be answered; yet it shall be deemed as no answer; and if a full answer be not filed, the bill may be taken as confessed.

But it is held, that on these hearings upon sequestrations, the bill is to be taken as confessed in no case, but where the defendant in contempt only is to be affected by the decree; but not where the interest of a third person may be injured who is not in contempt, as in the case of a trustee and *cessuque* trust; or of partners in trade; or where the remedy is at law; in which last case, by taking the bill as confessed against a defendant, an inconsistent or absurd decree might pass, which courts of equity are to be careful never to permit. See the case of *Carleton and Carr*, in this court, 26th June, 1758.

These bills to be taken as confessed, where the defendant in contempt only is to be affected, but not where a third person may be injured.

If the defendant pleads, or demurs, and the plea or demur is over-ruled, and the defendant ordered to answer, if he refuses, the bill may be taken *pro confesso*. 1 *Har. Chan. Pra.* 393. 3d edit.

After a plea or demur is over-ruled, and defendant ordered to answer, if he refuses, the bill shall be taken as confessed.

Where the process of contempt have run against a defendant to a sequestration, and there is decree to have \* the bill taken *pro confesso*, and the same confirmed and enrolled, and the defendant hath been duly served with such decree, and an attachment issued for non-performance thereof, he shall not be admitted to bring a bill of review and reversal, without performing the decree, or giving sufficient security to perform the same, in case the court upon application, think fit to direct the same, nor to bring a cross bill without depositing the money decreed, into court, (if the decree be for money;) or giving good and sufficient security for the performance of the decree, within such time as the court shall direct, and first paying down to the plaintiff such cost as is decreed to him, and the cost expended since the pronouncing the decree, and the cost of taxing the same.

After a decree to have a bill taken *pro confesso* is confirmed and enrolled, on what conditions the defendant shall be at liberty to bring a bill of review, or a cross bill.

\* 486

By the statute 1 *Geo. 2. Ch. 17. pars.* The courts of *Chancery*, and *Exchequer*, may proceed in all causes depending before them by *English* bill, and make such decrees against every person who hath been duly served with process, and have stood up to a sequestration, and is only a trustee, in the same manner, as if such trustee had duly appeared and put in his answer.

Court may proceed against trustees served with process to a sequestration, as if they had appeared and answered.

\* By

## Hearing.

\* 487

No conditional, but an absolute decree shall be made against such trustee.

\* By 5 Geo. 2 Ch. 4. pars. If such trustee hath been duly served with, and flood out process as aforesaid, no conditional decree shall be pronounced against him, on the hearing of the cause, but the court shall make such absolute decree therein, as if he had duly appeared on such hearing.

On affidavit that trustees cannot be found to be served, court may decree.

By 5 Geo. 2 Ch. 8. pars. In all such suits, which are, or shall be commenced by English bill in the *Chancery* or *Exchequer*, where it appears to the court by affidavit that the defendants are only trustees, and that diligent enquiry has been made after them, to serve them with process, and that they cannot be found, the said courts may hear and determine such causes, and make such absolute decrees therein, against all persons appearing to them to be only trustees, as if such trustees had been duly served, and had appeared and answered, and had appeared by their counsel and clerk at the hearing.

Not to bind persons having estates, rights or interests, to their own use.

\* 488

Provided, that no such decree shall bind, or in any wise prejudice any person, against whom it shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators for, or in respect of any estate, right or interest which such \* person shall have at the time of making such decree, for his own use or benefit, or otherwise than as a trustee.

How to proceed against mortgagors, or persons necessary to be served on bills of foreclosure, and absconding, or out of the kingdom.

By the 7th Geo. 2 Ch. 14. It is enacted, that upon all bills of foreclosure filed, or to be filed, in the courts of *Chancery* or *Exchequer*, where it shall appear to the court by affidavit, that any of the parties necessary to be served for carrying on the suit, do abscond or are out of the kingdom, so as, they cannot be served with process to appear and answer, but have been in the kingdom, within twelve kalendar months next preceding such affidavit, the courts may order, that service of the tenant of the mortgaged premises; or of the known agent, or receiver of the rents and profits, and at the last place of abode of the person so absconding, or being out the kingdom, shall be good service; and upon such parties neglecting to appear, or not answering in four terms after such service, the plaintiff prosecuting such suit, may proceed to have such bill taken *confesso*, as if the defendant had appeared upon such service; and the court shall make such decree as the case will permit, and from time to time make such further orders, as shall be proper for carrying such decrees into execution.

\* 489  
And against persons residing out of the kingdom.

\* Persons residing out of, and having an estate in the kingdom, shall be proceeded against in the same manner, leaving the copy of a *subpæna* at their last place of abode in this kingdom, if any such they ever had, or with their stewards, agents, managers or receivers.

Provided

## Hearing.

Provided that if the defendants, or their legal representatives, shall within two years after personal service of such decree, or if there be no personal service, then within seven years after making such decree, pay or give such security as the court shall approve of, to pay the costs which the plaintiff hath necessarily been at, and apply to the court to be let in, to appear and answer, and make such defence as the case will permit, the court shall permit them to appear, answer, and make defence: And in such case, there shall be the same proceedings, decree, and execution, as might have been in case the defendant had originally appeared, and the proceedings had been newly begun, and there had been no former decree, or proceedings; and if no defence shall be made within the respective times aforesaid, such decree shall be absolute and final.

Defendants or  
their represen-  
tatives may in  
two years after  
personal service  
of the decree, or  
seven years after  
making the de-  
cree, if no per-  
sonal service, be  
let in to make  
defence on pay-  
ing or giving se-  
curity for the  
costs.

And proceed-  
ings to be a-  
new, as if there  
had been no former decree.

\* If any bill be taken *pro confesso* in default of appearance as aforesaid, the plaintiff may give notice, (as before directed to compel an appearance,) that he intends to examine witnesses in two months after such notice, which notice being given, and the service thereof made appear by affidavit, to be lodged with the proper officer, and the time limited being run out, the plaintiff may by order and leave of the court, examine witnesses *de bene esse*, as well to the proof of any exhibit, as to any other matter necessary to be proved in the cause; but such depositions shall not be published without the special order of the court.

\* 490

On bill taken  
pro confesso,  
plaintiff may on  
such notice as  
aforesaid ex-  
amine de bene  
esse.

But depositions  
not to be pub-  
lished, but by  
order of court.

If after such bill shall be taken *pro confesso*, the defendant do come in and answer as is before directed, and if any of the witnesses examined for the plaintiff shall die, and if the plaintiff would have reason to examine such witness, if issue had been joined, then the deposition of such witness shall be as good as if issue had been joined: But the witnesses who were examined and are living, shall be re-examined; and not only to the matters they were formerly examined to, but to such other matters, which may arise from the nature of the defence \* made by such defendant, or the circumstances arising thereupon: And after such living witnesses are re-examined and their depositions taken, their former depositions shall be void, and stand suppressed, and shall not be copied or published.

But if a defen-  
dant after such  
decree makes  
defence and any  
of the plaintiff's  
witnesses die,  
such deposition  
shall be good,  
but the living  
witnesses shall  
be re-examined.

\* 491

By the usual practice of courts of equity, if defendants did not appear upon the service of Subpœna's to answer, the courts could not proceed to have the bill taken *pro confesso*, but the hearing, the court may on all bills, and in all cases appoint an attorney to appear for them, and such proceedings may be had, as if he had appeared.

plaintiff

## Hearing.

plaintiff was to have run out the process of contempt to a sequestration against the defendant, and the sequestrators were empowered to sequester the defendant's lands, &c. and to receive the rents; and if the lands were not set, then an injunction issued to put the sequestrators in possession, and they by order, to set, and receive the rents: This was a kind of remedy, but not an adequate one, and great inconvenience, and often failure of justice arising from hence, to remedy this;

It was enacted, by the aforesaid statute, 7 Geo. 2. Ch. 14. That where a defendant to any bill in the *Chancery*, or *Exchequer*, appears to be duly served with process of contempt to a sequestration, and neglects to appear by his fix clerk, or attorney in the usual manner, the court may appoint a clerk\* in court to appear for him, and then such proceedings may be had in the cause, as if he had actually appeared.

\* 492  
Attorney appointed and cause set down to be heard, the method.

The attorney for the defendant in this case, is appointed by the court, upon motion for that purpose, by a counsel for the plaintiff, on which motion, he is to produce an affidavit of the service of the *subp<sup>e</sup>na*, a certificate from the proper office of no appearance being entered, or answer filed, and the sequestration and return; and the plaintiff's attorney may then move the court, to have the cause set down to be heard aforesaid, and may set the same down in the paper of cause, to be heard as is before directed; and on such hearing, he is to produce the sequestration and return, the order for hearing, and a certificate of an appearance being entered, pursuant to the appointment of the court. But note, the plaintiff in this case, is not obliged to serve the defendant with *subp<sup>e</sup>na* to hear judgment, he is only to serve his attorney with the order for hearing.

Decree always absolute.

\* 493

And in this court, this decree upon the \* sequestration is always absolute, \* whether it be for want of an appearance, or for want of an answer.

\* This practice of the decree upon the sequestration, being always absolute, whether it be for want of an appearance, or for want of an answer, may, in the first case, be attended with an irretrievable injury to a defendant, as there are many instances, where process of contempt have been founded on false affidavits, of the service of *subp<sup>e</sup>nas*, so that a defendant may have his estate sold before he knows any thing of the matter. When the defendant has appeared, and the sequestration is for want of an answer, he undoubtedly cannot have so much reason to complain, as it is entirely his own fault: However, in the court of *Chancery*, the decree in both cases, but conditional, with a day to shew cause, and is to be served on the defendant.

## Hearing.

In the case of *Clement against Fitzgerald*, in this court, in Mich. term 1741, upon a bill being taken *pro confesso* (though not a bill of foreclosure,) and a decree thereon inrolled, it was insisted by counsel, on behalf of the defendant, that by the said last mentioned clause in the aforesaid statute, the court shall in all suits (where an appearance is entered by the court,) let the defendant into his defence, on paying or securing costs. But lord chief baron *Marlay* declared, that the proviso in the said act for letting the defendant into his defence, did not extend to this clause, and that this clause only empowered the court to order an appearance to be entered for the defendant, where he was served with process, and did not appear, and take the bill *pro confesso*, and make a decree as if \* an appearance had been actually entered by the party; but as to all the other proceedings in the said act, they remained the same: And further said, that it was not obligatory on the court, in this last case, to let the defendant in to answer, and make his defence, but a matter of favour, and discretionary.

\* 494

And as in the *Exchequer*, the practice always has been, not only where a defendant stands out process of contempt to a sequestration, but even to a commission of rebellion, that he shall enter into recognizance with sureties, to be approved of by the court, to perform the decree; so in cases of decrees founded on bills taken *pro confesso*, pursuant to the said statute the rule is, to let the defendant in, to answer and make defence, on paying such cost as the court, upon the circumstances of the case shall award, and also upon entering into recognizance to abide the decree of the court, and especially if the demand be personal. And it was so ordered in this case, that the defendant should give security to abide the decree of the court, re-join and appear *gratis*, and not suffer a conditional decree, and pay the costs out of pocket to be made appear by affidavit.

But the rule is to let the defendant in, on giving security to abide the decree, and paying such costs as the court shall award.

In the case of *Green against Dalloway*, in this court Easter term 1750, the defendant was let in to answer after a \* decree, upon a bill taken as confessed, upon giving security and paying of the taxed costs only, but in this case, the decree was not enrolled, and the fequstration appeared to have been obtained by surprize.

\* 495

But in the case of *Kearney against Stewart*, Trinity term 1753, the defendant was ordered to pay the costs out of pocket, as no fatality appeared, nor was any surprize pretended; and in this case also the decree was not enrolled.

But note, it is provided by the aforesaid act, that persons under the age of twenty-one years, or *non sane* memory, or the act, shall have two years to make defence, after service of a decree on a bill taken as confessed.

## Hearing,

*Some Court*, at the time any decree, in pursuance of the said act, is made against them, shall have two years from the time of the service of such decree upon them, after the removal of such disability, to make their defence, and shew cause against the same.

Some doubts on  
the said act, 7  
Geo. 3. in relation  
to hearing  
the cause, upon  
the appearance  
of the attorney  
appointed by  
the court,  
cleared up, by  
Stat. 13 Geo.  
2. ch. 9.

\* 496

Some doubts having arisen upon the aforesaid act, whether after such an appearance by a clerk or attorney, appointed by the court, the plaintiff is not to begin the process of contempt again, and run out the same to a sequestration, before he can proceed to hear his cause, which would be a great and unnecessary delay to the suitor. For remedy thereof, it was enacted by \* the 13 Geo. 2. ch. 9. to be the true sense and meaning of the said former act, That after such appearance by the appointment of the court, the plaintiff or plaintiffs may proceed to hear his or their cause, upon the sequestration obtained by him or them, as if the defendant or defendants had actually appeared and stood out such process of contempt or sequestration.

Defendant in  
custody to be  
brought into  
court by *habeas*  
*corpus*, before  
the bill be  
taken *pro confesso*.

Decree on a  
sequestration  
irregular, it  
cannot be re-  
ferred, it must  
be re-heard.

If an account  
be directed on  
the decree *pro  
confesso*, the  
defendant's at-  
torney is to be  
served with  
summonses, and  
the proceedings  
to be as if the defendant had appeared on the hearing.

\* 497

Where a defendant is in custody at the suit of the plaintiff, or of a stranger, the bill ought never to be taken *pro confesso*, until he has been brought into court by *habeas corpus*, and told of the danger he is in, if he does not answer; and a day given him to put in his answer, that the court may judge whether he is obstinate, or unable through poverty or otherwise to answer. *Curs. Canç. 115. Moseley's Rep. 384.*

If a decree is made on a sequestration irregularly, defendant may petition to re-hear, but it cannot be referred to a master for irregularity; for this decree binds the right, as well as any other decree; and if there be any error in it, it is an error of the judgment. *Ibidem. 295.*

But note, where a bill is taken *pro confesso*, and an account directed to be taken, the defendant's attorney is to be served with summonses to attend the \* officer thereon, as if the defendant had appeared on the hearing, and on his non-attendance, the plaintiff's attorney must obtain an order to proceed *ex parte*, as is before directed. See the case of *Jackson against Walcot*, in this court, *Mich. 1745.*

## Hearing.

Fifth. Of hearing upon interlocutory decrees, and on equity reserved, where an issue is directed to be tried at law.

A N interlocutory decree, as is before mentioned in pa. 409. Interlocutory is where the court decides some incidental intervening decree, question, upon the principal matter.

Or where the court doubts of any fact, and directs an issue to try it: This is an interlocutory decree, and is also called a leading order. For the proceedings thereon, see *Title Order*.

## Sixth. Of Hearing ad Requisitionem Defendantis.

BY the 49th general rule, when a cause is ready for hearing. If the plaintiff delay the prosecution, or be negligent to procure a hearing, the defendant may (if he will) procure the cause to be set down for hearing, and serve the plaintiff with process, *ad audiendum judicium*, at which day, if the plaintiff will appear, he may proceed to hearing; but if he will not, the defendant may be dismissed with costs, and left at liberty, if there were any injunction or order to restrain him.

RULE 49.  
\* 498

If plaintiff will not proceed, defendant shall be dismissed with costs, and left at liberty, if restrained by injunction or order.

When the plaintiff hath replied, the defendant may forthwith re-join; and if the plaintiff after rejoinder neglects to prosecute his cause, or to proceed to examine witnesses, and has lapsed a whole vacation; the defendant, if he has no witnesses to examine, may, the next succeeding term, put a rule on the plaintiff to examine his witnesses the next following vacation, or the cause to be heard the next term, on the pleadings. And if the defendant has any witnesses to examine, he may on such default of the plaintiff as aforesaid, move the court by his attorney to enforce the plaintiff to go to a commission, or in default thereof, that the defendant may have a commission *ex parte*, to such commissioners as the court or chief remembrancer shall appoint. Or he may examine his witnesses before a baron. See the 13th rule, *Title Replication and Rejoinder*.

How the defendant is to proceed to have the cause heard, where plaintiff after replication neglects to proceed.

## Hearing.

\* 499  
Or after publication.

So likewise, the plaintiff hath one term after passing publication, to consider whether he will proceed to the hearing of his cause or not; and if he fails to set it down in that time, the court will order it to be heard *ad requisitionem defendantis*, because the plaintiff has then delayed the defendant, by lapsing the time in which he was to hear the cause.

And the proceedings in either case.

And in either case, the defendant may serve the plaintiff with *subpoena* to hear judgment; and if the plaintiff doth not appear on the hearing, on affidavit made of the service thereof, and of the order for hearing, the plaintiff's bill shall be dismissed absolutely; because here are not to be two decrees, since the plaintiff, who is the aggressor, is always to be ready to maintain the justice of his cause.

Analogous to the trial by *proviso* at the common law.

And this proceeding in equity is analogous to the trial by *proviso* at common law, where, after issue joined, if the plaintiff will not proceed to trial within the third term inclusive, the defendant may then move for a trial by *proviso*.

If the cause be struck out of the paper, for the plaintiff's not appearing at the hearing, and he applies to have it again set down, it shall be after all the causes then set down.

\* 500

The defendant cannot put a rule on plaintiff to examine, or the cause to be heard on the pleadings, until the cause is at issue.

But if the plaintiff sets his cause down regularly for hearing, and when it is called on, is not ready, or doth not appear, it shall (as has been said before) be struck out of the paper, and he must apply to have it set down again: But with this difference, that as he hath once had his turn, and might have been ready if he had thought fit, so he shall be postponed, until all the causes which are then set down, are heard; and his cause shall be set down after all those which are then appointed and set down; and then he will have a second turn for the hearing of the cause.

But note, the defendant cannot put a rule on the plaintiff to examine his witnesses, or that the cause may be heard on bill and answer, until the cause is at issue. For first, the defendant can oblige the plaintiff to reply, or he may dismiss his bill: And then, when the plaintiff hath replied, the defendant as soon as he pleases may re-join, whereby the cause is at issue.

Of hearing *ad requisitionem defendantis*, and of the proceedings where either plaintiff or defendant neglects to appear at the hearing, and of conditional decrees and dismissals, and the proceedings thereon, see *Title Decree and Dismiss*, *per. tot.*

\* 501  
The preference to be given to a peer of the realm, as to the hearing of his cause.

Every cause in the paper is to be heard in its course, unless a peer of the realm, or privy council, be concerned, and he comes upon the bench; in which case, it is usual (after the cause then in hearing is over) to call the nobleman's cause; yet if it stands low, and the adverse counsel say they are not ready,

## Hearing.

ready, but will be so, when the cause is called on in its course; in this case, the court never forces them to go on, unless both sides are ready; but the nobleman must stay till his cause is called, and comes on in course.

## Some Instructions for briefing Causes, in all Cases.

WHEN the cause is ready for hearing then the briefs for counsel are to be prepared. Here now is the field for the skilful agent to exercise, and exhibit all the knowledge and abilities he has, and all the powers of his profession; for in the well ordering of the brief (especially if there have been proofs in the cause,) \* the success of causes, I may venture to say nineteen in twenty, most certainly depends. I shall therefore for the sake of those who are beginning the business, lay down the following rules.

The advantages  
in well briefing  
the cause.

\* 502

If there be a great variety of pleadings, (as often happens in a cause) let them be so ranged that they may follow in an easy chain, as thus.

If there be a  
great variety of  
pleadings.

If there be a bill and an amended bill before answer, unless the whole frame and method of the original bill be so altered, that there is no distinguishing or separating what is added, from what was in the first bill, as if the whole of the first bill be in the second, there will be no occasion for inserting any part of the first in the brief.

If bill and ame-  
ded bill before  
answer.

But if the additions, or alterations, be such as can be easily separated and distinguished, they only then are to be inserted in the brief, with any additional relief that may be prayed, first mentioning the time of filing it.

Then insert the answer, or (if there be several defendants) the answers. But here observe, that often in \* answers the charging parts of the bill are first answered, and afterwards the several interrogatories to each charge, which is a most inelegant manner of preparing answers, and often causes infinite confusion: Whereas nothing is more easy than to place each charge and the interrogatory thereto together, and to answer them at one view: Now when they happen to be thus separately answered, it is the agent's business to connect them in his brief, or his counsel will have a perplexed and troublesome work of it.

Answers how  
to be briefed.

\* 503

## Hearing.

Amended bill  
after answer.

So if an amended bill should be filed after the defendant hath answered, observe the rules before set down as to briefing the bills; then insert the answer to the original bill, and after it all the variations and additions, which are in the second answer, and those only, if they can be so distinguished and separated as is before mentioned; if not, you must insert the whole.

If exceptions to  
an answer, and  
further answer  
filed.

If exceptions be taken to an answer, as short and insufficient, and are allowed, or the answer reported short, and afterwards a further answer filed, you are only to mention this matter, as also the points unanswered, very shortly, and then only the additions in the further answer as aforesaid.

If abatement,  
and bill of re-  
vivor, and no  
new matter.

\* 504

\* If there be an abatement and a bill of revivor filed, if no new matter arises by the abatement, the matter of the abatement need only be mentioned; that a bill of revivor was filed, and the time of filing; and that on such a day the representative appeared, and the cause by order of such a date revived: If an answer was required and filed, then to shortly mention it, and the time of filing it.

If new matter.

If the bill of revivor contains new matter which has arisen from the abatement, then this must be shortly mentioned with the relief that is prayed.

If a replication.

If there be a replication in the cause, it must be mentioned; to shew that the defendant was put upon the proof of his answer.

The great care  
required in  
briefing them,  
and the method  
to be observed  
therein  
in all cases.  
Ibidem.

\* 505

And lastly if there have been proofs in the cause, they are also to be added; the briefing of which, as they ought to be done, I have always looked upon, to be as nice a part as any whatsoever of the real business of an equity solicitor.

Now in order to this, let him first set down from the interrogatories the \* several points that were examined to, as necessary to be proved; let him then most carefully read the depositions to the several interrogatories and mark the witnessess, if more than one, who answer or depose to each interrogatory: But to be sure to keep the proofs of each fact together; for if they be mixed, the confusion will be irrecoverable.

Ibidem.

If several witnessess answer pretty much alike in the proof of any fact, he may set down all of them together: If there be any variation, or more or less be said, it is an easy matter to set down this variation, omission, or addition, first mentioning

## Hearing.

ing that this deponent in all other respects agrees with the other.

If only a plain simple fact is proved; no more need be set Ibidem down than this:

First, deponent A. B. of, &c. to the second interrogatory  
ib. (C) fo. 10. and,

Second, deponent E. F. of, &c. to the same interrogatory,  
fo. 20. proves the execution of the deed of the  
day of 1758.

If it be a fact, which only can be proved by circumstances, Ibidem, there the \* depositions must be so inserted in the brief, that the counsel may judge, if from those circumstances, as they are in the depositions, the fact be sufficiently proved. \* 506

But upon the whole, let the several proofs to each fact be Ibidem, disposed in the brief in such concise, close, connected and familiar method, that the whole may appear to the counsel at one view, not setting down any of the wanderings or impertinencies of witnesses, or any thing that is not necessary or needless; and at the same time, not omitting aught that is material. This is a task (let agents think as they will) of no small nicety and difficulty, and (as I am told) is so much thought of in *England*, that in all causes of great consequence, the briefs are generally prepared by some of the younger counsel in the cause, or by what are there called chamber counsel.

If any exhibits are to be proved *viva voce*, on the hearing, If exhibits be to the order for this purpose is to be produced; but this may be proved done at any time while the cause is in the paper, by calling it on; due notice thereof having been first given as is before directed. See *Title Exhibits*.

\* If there have been any extraordinary proceedings in the cause founded upon special orders of court, these should be also mentioned in the brief; and the agent should have all such orders ready to be produced on the hearing as they may be demanded, as is above directed. \* 507

And it would be always proper (as is practised by some agents) to give counsel with their briefs a short sketch of the import of the several pleadings, with the several material points in the cause, in order to make them acquainted with the nature of their client's case, before they enter upon reading the briefs for hearing at large: In *England*, it is always done.

A short sketch of the whole cause to be given with the briefs.

Should

### *Infants.*

Cause if several days at hearing, copies of each day's notes, to be given to the counsel. Should the cause take up more days than one in hearing it, the counsel on each side should be furnished with copies of the notes, taken by the register each day against the succeeding one.

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\* 508 \* *Of Infants, and in what Cases they may sue, or be sued, or charged, and how they are to defend themselves in a Court of Equity.*

Infants w<sup>t</sup> at.

A LL persons before the age of twenty-one years, are here called infants.

How far bound in equity.

Although no proceedings may be had against an infant on a judgment or statute at common law, yet it is otherwise in equity; and in many cases infants may be farther bound in equity, than law, and they have been obliged to answer, when the *parol* should have demurred at law. 1 Ch. Ca. 164.  
1 Danv. 260. *Toth.* 108. *Sed vide* 1 Vern. 173. 428.

Ibidem.

\* 509

Also an infant may be here compelled to give a discharge of a debt due to, and received by him, and, in some special cases, he shall be concluded by his agreement: But regularly, though an infant be twenty years old, and \* makes a contract never so much to his advantage, &c. yet the court will not conclude him, nor make an absolute decree against him, though by his own consent, or the consent of parents, &c. except in some special cases, upon the merits of the cause. 2 Ch. Ca. 164.  
1 Danv. 260.

How he is to sue, and how to defend a suit.

An infant may sue in this court as plaintiff, by his *proximus*, or next friend; but if he defends a suit, it must be by his guardian, and his answer is taken upon the oath of the guardian, but the infant himself does not swear to the answer. See Title *Answer*, &c.

Ibidem.

Where an infant exhibits a bill, there is no occasion for a guardian to be assigned him by the court, but he exhibits his bill

bill by some proper person, his *procchein amy*, or next friend, *Procchein Amy* who is liable to pay the costs of the suit to the defendant, in case the court orders any costs to be paid. But where the infant is defendant, the guardian assigned by the court is to be called by that name; yet if the guardian be not so called (though it is at law, where the infant is plaintiff) it is no cause of demurrer in equity.

An infant may by his *procchein amy* call his guardian to an account, even \* during his minority; and if a stranger enters, and receives the profits of an infant's estate, he shall in this court be looked upon as a trustee for the infant. 2 *Vern.* 342.

May call his  
guardian to an  
account during  
his minority.

\* 510

All infant defendants by their answers put in an early claim to the care and protection of the court in relation to their right, and ought to have it, forasmuch as they are supposed unable to take care of themselves: And all decrees against them give six months, after they come of age, to shew cause.

And an infant cannot be foreclosed without a day to shew cause; (which is commonly six months after he comes of age) but the way in such a case is, to decree the lands to be sold to pay the debts, and that will bind the infant. 1 *Vern.* 295. 2 *Vern.* 342. But if there be a mortgage which depends upon a disputable title, so that no money can be had by an assignment of it over, this court will not decree an infant to be foreclosed, until six months after he comes of age. 2 *Vern.* 351.

An infant can-  
not be foreclosed  
without a day,  
but the lands  
may be decreed  
to be sold.  
But if the mort-  
gage depends  
upon a disputa-  
ble title.

Decrees are but very rarely made against infants, without a day to shew cause (which is commonly six months) after they come of age: But if lands \* are devised to be sold for payment of debts, they may be decreed to be sold without giving an infant heir a day to shew cause, for nothing descends to him; but otherwise, if he be decreed to join in the sale. *Cooke and Parson*, 2 *Vern.* 429. *Preced.* in Ch. 185.

Lands devised to  
be sold for pay-  
ment of debts,  
may be decreed  
to be sold with-  
out giving the  
infant a day,  
otherwise, if he  
be decreed to convey.

\* 511

Where a decree is against an infant, with a *nisi causa*, in six months after he comes of age, he may, on counsel's motion, obtain liberty to amend his answer, or put in a new answer, and thereby set forth his title, he having no other way than this to set forth his right, which he ought to have an opportunity of doing; for were the infant to be bound by the answer of his guardians, it would be at the same time that the court gave him liberty to shew cause, to tie up his hands from shewing cause. See 1 *Williams* 504. 3 *Williams* 402. where it is said to be a matter of course, and granted on a petition *ex parte*. And see before *Title Decrees*.

Infant when he  
comes of age  
may put in a  
new answer, or  
amend his an-  
swer.

And

*Infants.*

And he may file a bill of discovery against the plaintiffs in the first cause, and the decree shall not be made absolute till they answer.<sup>\*</sup>

\* 512

And may examine to prove his defence.

And see *Moseley's Rep.* 313. where it is held to be a good cause why a decree should not be made absolute against an infant, after he comes of age, that he has put in a new answer, and in the same case pa. 203, the court enlarged the time for the defendant to shew cause, after he came of age, why the decree should not be made \*absolute, till the plaintiffs in the first cause, had put in an answer to a bill of discovery he filed against them, after he came of age.

Infant defendant, not obliged to shew that the former defence was improper, or that he has a better defence to make, nor to pay costs before let in; but the court will make the plaintiff amends by costs if the defence be frivolous.

His answer by guardian no evidence against him when of age, if decree be without a day to shew cause; otherwise, of a superannuated defendant.

\* 513

Answer of infant may be referred for scandal, but the guardian or counsel to pay the costs.

A sequestration may issue against an infant.

In what cases chargeable or not chargeable.

Note, the consequence of an infant's putting in a new answer is, that he may examine witnesses anew to prove his defence, which may be different from what it was before. *Williams 402. Moseley's Rep.* 68.

In the case of *M'Allen against Hatton*, in this court, Hilary term, 1737. an infant having put in an answer, and having arrived at full age when the cause was in the paper ready for hearing, applied to be let in to make a new defence: Upon the motion, it was insisted for the plaintiff, That it should appear to the court, that there had been an improper defence, and that the defendant had a better defence to make, and That if the defendant was let in, it should be on the terms of paying cost; but the court were of opinion, that the course was to let the defendant into his new defence without paying cost; but that if on the hearing, the new defence appeared to be frivolous, they had it in their power to make the plaintiff amends by the cost they may award him.

\* If an infant answers by guardian, and a decree is against him without a day to shew cause, such answer shall not be read, or admitted as evidence against him when of age; but otherwise of a superannuated defendant, who puts in his answer by his guardian. *Trin. 1704, Sir Richard Leving and Lath Caverly. Preced. in Chan.* 229.

The answer of an infant may be referred for scandal, but it being upon the oath of the guardian, he, and not the infant, shall be liable to pay the costs, or rather the counsel who signed such answer.

A sequestration may issue against an infant for not appearing. *2 Ch. Ca. 163.*

It is said an infant may be charged in trover because a tort, but not on a contract, nor as bailiff, nor for goods to carry on a trade; and therefore, when made factors, securities should be taken from their friends for their accounting. *Trin. 1700. between Smally and Smally. Bac. Fq. Ca. 6.*

## Infants.

If an infant plaintiff, or defendant, arrives at full age pending a suit, a motion is to be made by his \* attorney, for an order that all the future proceeding may be in his own name, which the court will grant, and this order need not be served, nor the bill amended or altered.

Infant arriving at age pending a suit; motion to be made to proceed in his own name.

\* 514

Any person may bring a bill as *prochein amy* to an infant, without his consent; because it is at his peril that brings it to be answerable for the event: But none can bring a bill in the name of a *feme covert* as her *prochein amy*, without her consent, and if such bill be brought, upon her affidavit of the matter, it will be dismissed.

Any person may bring a bill as *prochein amy* to an infant, but cannot in the name of a *feme covert*, without her consent.

Where one receives the profits of an infant's estate, and he neglects to enter six years after he comes of age, he is as much bound by the statute of limitations, from bringing a bill for an account of profits, as he is from an action of account at common law. *Preced. in Ch.* 518.

Infant barred by the statute of limitations, from bringing a bill for an account of profits.

By an infant's coming of age, administration, *durante minori estate*, ceases, and the suit by such administrator is thereby determined, so that the infant cannot go on therewith, but must begin anew, unless a decree to an account were had; in which case the infant, on a bill brought for that purpose, may be allowed to go on therewith. *Quare* if \* such administration had been *cum testamentum annexo*. *Preced. in Chan.* 174.

Suit by administrator *durante minori estate*, determined on infant's coming of age, unless a decree to an account be obtained

\* 515

One devises one thousand pounds, to be laid out in the purchase of lands in fee, for the benefit of A. B. and C. and their heirs, equally to be divided, A. dies, leaving an infant heir; B. and C. may have their shares paid them in money; but as to the share of the infant, it must be put out for the benefit of the infant; who by reason of his infancy, is incapable of making an election; besides that such an election might, (were he to die during his infancy) be prejudicial to his heirs. *1 Williams*, 389.

Money devised to be laid out in the purchase of lands in fee, an infant who is to have the benefit thereof, cannot make his election to have the money.

One borrows money during his infancy, and applies it to the buying of necessaries, and afterwards coming to age, devises his lands to trustees for payment of his debts with interest, and dies, the debt contracted during infancy is within the trust. And in all cases when an infant borrows money, and applies it towards payment of his debts for necessaries, although he may not be liable at law, he must nevertheless be so in equity; because in this case the lender of the money stands in the place of the person paid, viz. the creditors for necessities, and shall recover in equity, as the other should have done at law. *Ibidem*, 558.

Infant borrows money and applies it to the payment of his debts for necessities, he shall be liable in equity, though not at law. And this debt shall be paid out of a trust estate, devised for payment of debts.

*Infants.*

\* 516

No laches to be imputed to an infant, or *feme covert*.

No laches are to be imputed to a *feme covert*, or to an infant. *Ibidem*, 718. *Sed vide 1 Vern. 256.* where the possession was recovered in the life-time of the infant's father, in such case, it was determined that laches would run against the infant. But equity will relieve, and not suffer him to be barred by the laches of his trustees; nor to be barred of a trust estate, during his infancy; and the infant in this case shall have the mean profits. *2 Vern. 368.* See *Title Limitation*.

Though an infant cannot bring a bill for an account against his guardian during his minority, yet a third person may

At common law, an infant is liable to pay costs, if the judgment be against him,

The law is particularly favourable to, and careful of, an infant's interest; and though the infant himself cannot bring an account against the guardian, until his coming of age; yet a third person may bring a bill for an account against the guardian, even during the minority of the infant. *2 Williams 119.*

At law the infant is liable to pay the costs, if the judgment be against him; as if an infant brings an action of battery, and has a verdict against him, he must pay the costs; and if the common law be so, why should it not be so in equity, otherwise an infant would be left at liberty to plague mankind as he thinks fit. *Ibidem*, 297, 298.

\* 517

So he shall in equity, if he brings a bill, and never stirs in it, after he comes of age, and the bill is dismissed. If infants be bound by what is prejudicial to them in the bill or answer, filed by them.

\* And therefore if an infant by *prochein amy* brings a bill, and never stirs in it after he comes of age, and the bill is dismissed; if it be a general dismissal, the defendant has his election, whether he will sue the infant, or *prochein amy*, for such costs, *Sed quer.* if the infant pays them, if he may take his remedy over against the *prochein amy*. *Ibidem*.

Where an infant in his bill by mistake of his agent, submits to any thing that will be prejudicial to him, this will not be binding, but he will be allowed to amend. *2 Williams Rep. 389. Sed vide Moseley's Rep. 198. 199.* where an infant to a creditor's bill, insisted that the parol ought to demur during the minority, it was ordered accordingly, although his counsel would have waived it, as prejudicial to him. In the case of *Cecil* against the earl of *Salisbury*, it was determined, that an infant shall be bound by the offer made in his answer, if the other side are thereby delayed, and if the infant does not after coming of age, apply to the court to retract his offer, and amend his answer. *2 Vern. 224.*

*Ibidem.*

\* 518

And in the case of lord *Brooke* against lord and lady *Hertford*, in *Hilary term 1728*, lord chancellor declared \* That an infant when he is plaintiff, is as much bound, and as little privileged as one of full age. *2 Williams 519.*

The guardian of an infant to be served with

Where an infant is defendant, the affidavit of the service of the *subpoena* to hear judgment must be, that the guardian was subpoena to hear judgment, not the infant.

served

## Infants.

served, not the infant; and this (as it seems) though the infant be above fourteen, or want ever so little of twenty-one, and the service of the infant is not good; for non *constat* but the infant might be in his cradle, or should it appear by the bill, that he is near twenty-one; yet being not able to defend himself, the service must be on the person appointed by the court to defend him. *2 Williams Rep. 643.*

In the *Exchequer in England*, where an infant is party, and his interest is concerned, the court does not allow of an order to examine a witness *viva voce*, to prove a deed or exhibit, but the witness must be examined in the office upon interrogatories. *Ibidem. 464.*

*Exchequer in England will not examine a witness viva voce, to prove a deed where an infant is a party.*

If one enters upon the lands of an infant, he shall when of age, recover the profits from the time of entering.

\* 519

Where a person enters upon the lands of an infant, such infant, when he comes of age, shall by a bill in equity recover the profits from the time of the first entry. The reason is, when one enters on an infant, he is chargeable as bailiff or guardian, and no laches shall be imputed to the infant; wherefore it will be construed, as if he had entered as soon as his right accrued. But where there is a verdict against an infant's title, he can have no account until he has recovered at law. *Ibidem, 645. 1 Vern. 295. 2 Vern. 342.*

So if a man, during a person's infancy, receives the profits of an estate, to which the infant is intitled; and continues to do so for several years after the infant comes of age, before any entry is made upon him, yet he shall account for the profits throughout, and not during the infancy only. *Pasch. 1699. Yallop and Holworthy. Bac. Eq. cases, 280.* But the infant must enter in six years after he is of age, as is before mentioned. See *Prep. in Chan. 518.*

So where a person receives the profits of an infant's estate, and continues to do so after he comes of age, before entry on him, yet he shall account throughout. Otherwise where there is no infancy, trust, nor entry made

If there be no trust, nor infant in the case, nor any entry made by him who is intitled to the mesne profits, equity will not decree any account of the rents and profits. *2 Vern. 724.*

If an infant be aggrieved by a decree, he is not bound to stay till he is of age, but may as soon as he thinks fit, bring a bill of review, or may re-hear, or bring an original bill, and alledge specially the errors in the former decree. But if the decree against the infant be not fraudulent, though in every respect \* not so equitable, the court will not set it aside. *1 Williams, 735. 737.*

Infant aggrieved by a decree, may bring a bill of review, re-hear, or bring an original bill, even during minority. But the court will not set aside the decree if not fraudulent, though not so equitable.

\* 520

But it is said, that an infant, although he be aggrieved by decree, shall not be allowed at any time to bring a new bill, or amend his former bill, in any points wherein it had been dismissed on the merits.

or

## Infants.

or to amend his former. See *Moseley's Rep.* 68, where it is said, that in the case of *Sir John Napier* against lady *Effingham*, & *e contra* in Hilary term 1726, lord chancellor assisted by the master of the rolls, declared he had directed precedents to be searched for, and that none appeared for amending a bill in any points, wherein the same had been dismissed, upon the merits, and refused to let *Sir John Napier* bring a new bill, or amend his former, but gave him liberty to re-hear.

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### What Acts of Infants are good, void, or voidable, and when they shall be bound by the Acts of others.

At what time  
an infant may  
make a will.

A N infant female may make a will, and dispose of her personal estate, at twelve years of age; an infant male, at seventeen, or at fourteen, if proved to be of discretion. *1 Vern.* 255. *2 Vern.* 469. *Preced. in Ch.* 316.

\* 521.  
Infant may be a trustee.

\* An infant may be a trustee as well as one of full age. *3 Vern.* 561.

By what condition  
an infant  
shall be bound.

Where an estate is given to an infant, upon a condition, such act, as an infant can perform, must be done by him; and infancy in such case is no excuse. *2 Vern.* 343. *1 Willm.* 560.

Ibidem.

And infants shall be bound by conditions in fact, and by all conditions, charges, and penalties in an original conveyance, whether he comes to the estate by grant or descent. *1 Inst.* 233. *1 Mod.* 300.

Sale by infant  
not good.

If an infant sells lands for money, with which he purchases other lands, yet this sale made by him shall not be helped in this court, because he is disabled by a maxim in law. *16 Inst.* 1. *Dodderidge and Hutton.* *1 Roll. Abr.* 376.

But if, when he  
is of age, he  
assents to an agree-  
ment made  
under age, it  
shall be good.

But if an infant makes an agreement, and receives interest under it after age, such agreement shall be decreed against him. *Hilary 1682. Franklin and Thornebury.* *1 Vern.* 132. So if he exchange lands, and continues in possession after age, he shall be bound by it. *2 Vern.* 225.

\* 522  
Infants bound  
by the offer in  
his answer, un-  
less he retracts  
immediately af-  
ter he is of age.

\* If an infant desires that lands subject to a trust for paying the portions of younger children, may not be sold, and offered by his answer to settle other lands for raising the portions, he shall be bound by such offer, if the other side are thereby delayed, and if he does not immediately after age, apply to the court to retract his offer, and amend his answer. *Cecil and the earl of Salisbury.* *2 Vern.* 224.

## Infants.

And if an infant borrows a sum of money, for which he gives a bond, and devises his personal estate (being of sufficient capacity) for the payment of his debts, particularly those he had set his hand to, this bond debt shall be paid. 1651, *Hampion* due by bond. and lady Sydenham. *Nel. Ch. Rep.* 55. *Odoceo* edit.

If an infant executor assents to a legacy, such assent shall be good, if there are sufficient assets besides, to pay debts, otherwise not. 1 *Cha. Ca.* 256.

But an infant executor before seventeen, cannot bind himself by his assent to a legacy. 5 *Rep.* 20. *Cro. Eliz.* 719. and an infant executor, may administer at seventeen, but cannot commit a *deplacavit*, until of full age. 1 *Vern.* 328.

\* Where an infant is made executor, administration must be granted *cum testamento annexo*, to his guardian, or next friend *durante minori aetate*; but the administration ceases when the infant is seventeen years old: So if an infant executrix before seventeen takes a husband of full age, the administration immediately ceases. 5 *Rep.* 29. 6 *Rep.* 67. 2 *Inst.* 398.

It ceases when he is of the age of seventeen, or if a woman, and she marries before.

But if an infant is intitled to an administration of the goods of an intestate, administration must be granted to another, until he is twenty-one; because a minor cannot enter into a bond with sureties to administer faithfully, as required by the statute 22, 23, *Car. 2.*

But where administration of the goods of an intestate, is granted to another for an infant, it continues till the age of twenty-one.

A fine cannot be taken from an infant, but a recovery may, by the king's special direction. 1 *Vern.* 461. 2 *Vern.* 225.

A recovery may be taken from an infant by the king's special direction, but not a fine.

Where a small legacy is given to an infant, money expended for his maintenance and education, shall be allowed out of it, though it breaks into the principal. But where the legacy is considerable, the maintenance shall be restrained to the interest of the money. 1 *Vern.* 255.

Money laid out for maintenance and education of an infant, to be allowed out of a small legacy, though it break into principal. But otherwise, where legacy is considerable.

\* And courts of equity have often decreed building leases for sixty years of the estates of infants where for their benefit. 1 *Vern.* 225.

If a *feme* infant seised in fee, on a marriage with the consent of her guardians, should covenant in consideration of a settlement of a competent settlement, covenants to convey her inheritance to her husband, equity will execute the agreement.

Equity will decree building leases of infants estates.

Infant seized in fee on marriage, in consideration of a competent settlement, covenants to convey her inheritance to her husband, equity will execute the agreement.

ment

*Infants.*

ment to convey her inheritance to her husband. If this were done in consideration of a competent settlement, equity would execute the agreement, though no action would lie at law to recover damages. 2 Williams 244.

Of acts for a child in *ventre sa mere*.

*Hæredibus de corpore procreatis & procreandis.*

The infant's answer by guardian shall not be read against him.

Lease may be renewed in case of minors, and how.

\* 525

A child in *ventre sa mere* is capable of taking; may be vouch'd: A bill may be brought on its behalf; and an injunction to stay waste; the mother may justify detaining of writings on the behalf of a child in *ventre sa mere*; a limitation, *hæredibus de corpore procreatis*, shall include issue after born; and so, *e converso*, *procreandis* includes issue already born. Vern. 71.

The answer of an infant put in by guardian, shall not be read as evidence against the infant. *Secus* of a superannuated person. See *Preced.* in Chan. 229.

By stat. 11th Ann. Ch. 3. If any person, who, in pursuance of any \* covenant or agreement, in any lease for life, or lives, of any lands, and for renewing the same, on tender and payment of some fine certain on the death of any life, or lives in such lease, by adding such life, or lives, on failure of the life or lives in being, within the times of such agreements and covenants mentioned as the lessee shall nominate, ought to make such new lease, shall be under any disability so to do, by reason of infancy, (by direction of the court of *Chancery*, or *Ecclesiaster*, signified by an order made upon hearing all parties concerned on the petition of such lessee,) the guardian of such infant, upon such lessee's performing all such matters, as by the said covenants and agreements ought to be performed, previous to such renewal, in such manner as shall by such order be directed, shall renew such lease by adding such new life, or lives, as shall be named by the said lessee, according to the said covenants and agreements.

And of feme coverts, idiots, and persons beyond seas.

\* 526

Where a person who by covenant or agreement, is obliged to make such renewals, is disabled by being under *coveture*, beyond the seas, or *non compas mentis*, the lord chancellor or commissioners of the great seal (upon petition made in *Chancery*, and \* upon the lessee's performing every such matter, as by the said covenants and agreements ought to be performed previous to such renewal) may appoint such renewal to be made by one of the masters of the said court of *Chancery*, and such master so appointed, and also such guardian as aforesaid, shall execute such deed of renewal, in the name of the person who ought to have renewed the same; which deed of renewal (a counter-part thereof being perfected by the lessee for the use of the person having the reversion and inheritance of such lands,) shall be as effectual as if the person under age, had been of full age, or as if the other person had not been so disabled, and had severally executed the same.

Provide

*Infants.*

Provided such person under age, or under such disability as aforesaid, was, at the time of the renewal of such lease, compellable to make such renewal.

By stat. 2 Geo. 1, Ch. 6. It is enacted, that any person under the age of twenty-one years, by the direction of the court of Chancery, or Exchequer, signified by an order, made upon hearing all parties concerned, upon the petition of the person, for whom such infant shall be seized or possessed in trust, \* or of the mortgagor, or guardian of such infant, or person entitled to the money secured upon any lands, &c. whereof any infant shall be seized, or possessed, by way of mortgage, or of the person entitled to the redemption thereof, may convey and assure such lands, and in such manner, as the court of Chancery, or Exchequer, shall, by such order direct, to any other person; and such conveyance and assurance shall be as effectual, as if the infant was of age.

Infants seized of estates in trust, or by way of mortgage, may convey by the directions of the court of equity.

\* 527

And every infant being only trustee, or mortgagee, may be compelled by such order, to convey and assure, in like manner, as trustees, or mortgagees of full age, are compelled to convey or assign their trust estate.

And they shall be compelled to convey, by order of the court.

In the case of *Hollworth against Lane*, Trin. 1729. Moseley's Rep. 197, upon a motion made for the executor of the mortgagee, it was referred to a master, to see whether the heir of the mortgagee was a trustee, within the act 7 Ann. Ch. 19 Eng. (which is the same with the above act.) The master reported him to be a trustee within that act, upon which report an order was made, that the heir should assign over the mortgage to such person as the executor \* should appoint, and a motion was afterwards made to set aside the report, because the heir was not a trustee for the executor by the meaning of the act, and because the reference was made on a motion, whereas the statute requires it should be by petition.

The heir of the mortgagee is a trustee within the act, both for the mortgagor and the executor of the mortgagee.

\* 528

And upon this motion his lordship declared, that there can be no doubt but a mortgage in fee descends on the heir of the mortgagee; but it is as certain that the money belongs to the executor, so that the heir is only his trustee; and this was the very inconvenience that the statute was made to remedy; that the mortgagor might be willing to pay the money, or the executor might want it, and that in either case, they should not be obliged as formerly, to wait the full age of the heir.

Moseley's Rep. 197.

And his lordship declared, that a motion is a petition not reduced into writing, and presented; and that he did not know that the statute did require these circumstances, and that the general practice is to pray a reference by motion.

A motion is a petition, and in this case a reference may be prayed by either.

## Injunctions.

Heir of vendee  
a trustee for the  
person who paid  
the purchase  
money.

And in the same case it was held, that the heir of the vendee was a trustee within the said act, for the \* person who paid the purchase money.

\* 529

The consent of  
next heir at law  
requisite, sed  
quær.

But the trust  
must appear in  
writing, or the  
court will leave  
the cestuique  
trust to get a  
decree.

But note, the court will not on motion, or petition, order an infant trustee to convey, unless the trust appears in writing; but in such case, will leave the *cestuique* trust to bring his bill, and have a decree against the infant to convey, because the orders for an infant trustee to convey, ought to be in the plainest cases, and not in such as are subject to disputes, which trusts without writing may be liable to. 2 Williams, 546.

## Injunctions.

Injunction what

A N injunction is a writ remedial, in nature of a prohibition, sometimes issuing out of this court upon a bill filed: And it may be granted either to stay proceedings at law; or to prevent frequent distresses; or to stay waste, or damage to the freehold or inheritance of any other, by felling \* timber, &c. or it may be, to yield up, quiet, continue, or restore, the possession of lands, &c. But this last sort of injunction is a judicial-writ, and subsequent to a decree, being in the nature of a writ of execution, or *habere facias possessionem*, at the common law. See Title Decree.

Ridem.

But sometimes, in ordinary cases, injunctions are granted to quiet, or restore possessions before hearing. And also injunctions in nature of writs of *estrepment* at law, to stay waste, destruction and spoil: For the proceedings on these, see the proceedings upon possessory and injunction bills, under Titl Bill. See Bunn. Rep. 110.

And

## Injunctions.

And First, of Injunctions to restore and quiet the possession of Lands, in cases of forcible entry and Detainer, and of Injunctions to stay Waste, &c. and in what Cases they shall be granted.

FORCIBLE entry, is when one or more with unusual weapons, violently enter a house or land, or use violent and threatening words, to the terror of the party, and by that means gain possession. *i Inst. 257. Bolton, 103.* \* 53<sup>1</sup> Forcible entry what.

Forcible detainer, where an entry is peaceable, but possession detained by force of arms, or unusual weapons, or with threatenings. *Ibidem, 103.* Forcible detainer what.

If a lessee holds over against the landlord, it is a forcible detainer. *Cro. Ja. 199.* Holding over a forcible detainer.

If a lessee of one man takes a lease from another who has a better title, and refuses to give the possession to the first lessor, this is a forcible detainer. Forcible detainer by a lessee for years.

Persons continuing in possession of a defeasible estate, after the title is defeated, are punishable for forcible entry; for continuing in possession afterwards amounts in law, to a new entry. *i Inst. 246.* To continue in possession of a defeasible estate, after it is defeated, is a forcible entry.

And in all cases, where any disturbance is given in houses or lands, or the enjoyment of water, or water-courses, &c. whereof any person hath been in possession for three years and upwards, upon filing a bill, and proper affidavits, setting forth, That the party complaining hath been three years in possession, before filing the \* bill, that his title is still in being, and undetermined, and the force, or disturbance committed, the court will award an injunction, to restore, or quiet, according to the nature of the case: For the proceedings at large, see *Possessory Bills*, under *Title Bills*. Injunction to restore and quiet, upon a bill filed, and proper affidavits. Affidavit what to contain. \* 53<sup>2</sup>.

And by the course of the court, these injunctions, as to lands, are to be granted in two cases only; to stay waste, and cases. Only in two cases. *Mosley's Rep. 171.*

After a long enjoyment of a water-course running to an house and garden, through the ground of another, it shall be presumed that the owner of the house has a right to the water-course, unless the other party can shew a special licence, or an agreement to restrain it in point of time; so held, in the Water-course long enjoyed shall presume a right. *case*

## Injunctions.

case of *Wilson and Stewart*, in the court of Chancery, Trin. term 1748.

Injunction to  
the party if af-  
fidavit be full,  
and defendant  
not to be heard  
until he appears.

\* 533

If the affidavit is full, as to the several particulars before mentioned, and that the application hath been made, within the time prescribed by the court for bringing possessory bills, (see *Possessory Bills*,) the court will \* immediately grant an injunction to the party; who, if he be minded to contest the matter, must appear as upon an attachment, and submit to be examined on personal interrogatories.

But if affidavit  
be not full, or  
doubtful, the  
court will give  
a day to shew  
cause.

But defendant,  
not to appear.

Time defendant  
has to appear.

Though a man  
gets a possession  
by force, or  
fraud, yet after  
three years, he  
shall have an in-  
junction, on a  
forcible entry.

\* 534

But if the affidavit be not full as to any of the aforesaid particulars, or doubtful, the court will give a day to shew cause, and will hear what defence the defendant can make, by affidavit or otherwise. But note, in this case, the defendant is not to appear; so, if he would move to set aside the order, for the appearance, it is said, cures all defects, that may be in the affidavit, as it does in process; and the defendant must then answer personal interrogatories. So determined in the case of *Bourke* against lord *Lisle*, in Chancery, on full debate before commissioners, in Trinity vacation, 1760. See also a case in Chancery, the 1st of February 1698, and the 19th of February 1725, *Carroll* against *Ennis*. And note, in this court the defendant has eight days to appear to the injunction, in Chancery but six.

Although a man gets into possession by force, or fraud, if he continues in an entire possession for three years, he is entitled to an injunction upon a forcible entry; for no man is to carve a remedy for himself, nor to make use of force to restore himself, but ought to \* apply to a court of equity to be relieved against the fraud, and to be restored to the possession in a legal manner; or he may bring his ejectment, and have the suit tried at law.

Injunctions be-  
fore answer,  
and before trial  
at law, to quiet  
plaintiff in the  
enjoyment of  
water-courses,  
mines, &c.

If a bill is brought, to be quieted in the enjoyment and establishment of a water-course, and of weirs, for working of stamp mills, and mines, or collieries, diverted and broken down by the defendant; the court will grant an injunction before answer; and make an order on the defendant, to put the premisses in the same repair they were before the injury; and this the court will do, after a long enjoyment, before the right is established at law, for fear the mines, &c. should be ruined in the mean time, and a proper remedy can be had in another court. 2 Vern. 290. *Moseley's Rep.* 89, 90.

Tenant for life  
of coal mines,  
may open new  
pits, or shafts,  
for the working  
the old vein of  
coals.

In the case of *Clavering* against *Clavering*, 2 Williams 389, the defendant was tenant for life, but not without impeachment of waste, and the plaintiff was the remainder man in tail, and in the lands there were several coal mines, which were open before the defendant came to the estate, and the defendant, the tenant for life, opened the earth in several places but with design only to pursue the old vein of coals; and the plaintiff

plaintiff moved for an injunction to stay the defendant, \* from opening the earth in any new place, but the court declared, that tenant for life of coal mines, may open new pits for shafts, for the working the old veins of coals, and that it would be hazardous to grant an injunction to stay the working of a coal mine; and lord chancellor King said, that it seemed as if the tenant for life may work all mines, which were lawfully opened by the precedent tenant in tail, though subsequent to the settlement, and denied the injunction.

One seized in fee of upper and lower mills, leases the lower with the stream, and covenants for quiet enjoyment; and after leases the upper, and lessee covenants not to divert or pen up the said streams, to the prejudice of the lower mills; on a breach of this covenant, the lessee of the lower mills, may bring a bill in the room of his lessor, for an injunction, without first bringing an action of trespass. *Moseley's Rep.* 145.

In what case a lessee may bring a bill, for an injunction, in the room of his lessor.

A trustee having contracted to sell an estate, to one person, and the *ceſtuique* trust, having actually sold it to another, who moved for an injunction, to quiet him in the possession, being disturbed by the trustee, it was held by my lord keeper, that an injunction for quieting the possession, is only grantable, \* where the plaintiff has been in possession for the space of three years, before the bill exhibited upon a title yet undetermined; or in case the cause hath been heard, and judgment passed upon the merits of the case, by the court. *Lady Poine's case*, *Vern.* 156.

Injunction only to be granted where the plaintiff has been three years in possession, before the bill filed, and upon an undetermined title.

It is said an injunction is never to be granted, before bill filed. *4 Inst.* 92. *Vide*, *1 Vern.* 156, where it is said, that the defendant cannot have an injunction, because he has no bill filed.

Injunction, if to be granted before bill filed, and in what cases.

But where a mortgagee brought a bill to foreclose, and, pending the suit, an advowson appendant to the mortgaged manor became void, and the mortgagee being hindered from presenting, brought his *quare impeci*, and the court granted an injunction, on the defendant's application, though he had no bill filed. *2 Vern.* 401. 550.

Nowhere a cause abated by the death of lady Gerard, and the defendant was her executor, who being served with a copy of a bill of revivor, and the lord keeper's letter, would not appear, being in privilege, and upon motion, an injunction was granted, though the cause was not revived. And the case of *Armstrong and Jackson* was cited, where, before a demurrer determined, the plaintiff had an injunction on motion, *Trin.* 1700, between the duke of *Hamilton* and the earl of *Macclesfield*. *Bac. Eq. Ca.* 285.

Injunction granted, in case of an abatement before the cause revived.

## Injunctions.

Ibidem.

So where the lord *Wharton* had an injunction, to quiet him in the possession of the mines in question; and upon hearing of the cause; an issue was directed to try, whether the mines in question, were within the plaintiff or defendant's manor; the issue was tried at bar, and found for the plaintiff: When the plaintiff died, and a bill of revivor was brought, and before the time for answering was out, or the cause revived, the plaintiff moved for an injunction, to stay the lord *Wharton's* working the mines, having affidavits, that since the verdict against him, he had treble the number of workmen, and between that and *Candlemas* would work out the mines, and an injunction was granted, though the cause was not revived. *Mich. 1702, between Robinson and lord Wharton. Bac. Eq. Ca. 285.*

Injunction for possession sometimes granted, pending the suit, or the rents to be paid into court, and sometimes both, and the court will order a receiver.

\* 538

Tenant in possession, in what cases restrained from committing waste.

Sometimes, pending the suit, the court will order a party possession, by injunction; or that the rents, not already paid, shall be stayed in the tenants hands, until hearing; and sometimes will order both: At other times will order a receiver, who, upon good security, shall take the rents and profits and pay them into court, or account \* for them when the court shall require; and he to enter into such recognizance as the court directs, to secure his accounting for, and paying such rents into court,

Although a court of equity will not afflict a forfeiture, yet the tenant in possession shall be restrained in equity, from committing wastes, in all cases in which waste is punishable by law; and for this purpose, an injunction, it is said, will in this case be granted, before the bill is filed: *Sed quer. vide 4 Inst. 92. 1 Vern. 156.* Also an injunction will be granted to stay waste, in behalf of an infant in *ventre sa mere*. Equity will likewise, in some particular cases, restrain the tenant from committing waste, where it is disipunishable by law, either by the nature of his estate, or by express grant of *without impeachment of waste*: But where by the grant of the parties the lease is made, without impeachment of waste; equity will not restrain the lessee from cutting timber, plowing, opening mines, &c: though such lessee shall be restrained from pulling down houses, defacing seats, &c. *Hard. 96. 1 Ch. Rep. 13. 14. 106. 116. 2 Vern. 263. 392. 711. Salk. 161. 2 Ch. Ca. 32. 2 Ch. Rep. 94.* See *Bac. Eq. Ca. 399. 2 Vern. 401.*

\* 539

Tenant for life, when enjoined from waste.

\* A. tenant for life, remainder to B. for life with reversion, or remainder in fee; A. though disipunishable of waste at law, by reason of the mesne remainder for life, shall be enjoined from committing waste, in a court of equity, for this is a particular mischief. *1 Roll. Abridg. 377. Moor, 554. S. P. 1 Vern. 23. S. P.*

But not tenant for life, sans waste.

But tenant for life, without impeachment of waste, shall not be enjoined from committing waste. *1 Vern. 23.*

A. on

## Injunctions.

A. on the marriage of his son, settles a messuage to the use of himself for life, *sans* waste, remainder to his son; though the estate for life of the father be *sans* waste, yet he cannot pull down the house, nor commit any voluntary waste, and if he does, the court will grant an injunction; because this is an abuse of the power, and derogatory to the grant, and will oblige him to put the house in as good repair, as it was before the waste committed; the intent of the privilege, being only in order to cut down timber, and open new mines. *Salk.* 161. 2 *Vern.* 738. 1 *Williams*, 528. 2 *Ch. Ca.* 32. *Preced.* in *Ch.* 454.

But tenant for life, *sans* waste, cannot commit voluntary waste, in abuse of his power, and derogatory to his grant.

In the case of the bishop of London against Webb, 1 *Williams*, 528, upon \* a bill brought against the defendant, who was a lessee for years *sans* waste, with remainder in fee to the defendant, for an injunction against digging the ground for bricks, Lord Ch. Parker, did enjoin the defendant from further digging; for that it was destroying the soil, and to the ruin of the inheritance, but gave the defendant leave to carry off the bricks he had dug.

Lessee for years, *sans* waste, enjoined from digging bricks.

\* 540

But may carry off the bricks he has dug.

In this case it was mentioned, that it was hard, that the lessee for years *sans* waste, should enjoy the trees, or the materials of the house, when he pulls them down; for that before the Statute of Gloucester, waste did not lie against a lessee for years, and that being without impeachment of waste, seems originally intended only to mean, that the party should not be punishable by that statute, and not to give a property in the trees, or materials of the house; his lordship agreed to this, but said, that the resolutions having established the law to be otherwise, his lordship would not shake it, much less carry it further.

And shall enjoy the trees, or the materials of the house he has pulled down.

The privilege of being *sans* waste, will not, in equity, intitle the lessee for years to pull down an house, or even cut down trees that are for the ornament of the house. 1 *Williams* 528. And it was declared by the earl of \* Nottingham in *William and Day's* case, 2 *Ch. Ca.* 32. that he would stop the pulling down of houses, or defacing a seat by tenant in tail, after possibility of issue extinct, or by tenant for life though punishable of waste by express grant, or by trust. *Sed vide Ca.* in equity 16, where it is agreed by lord chancellor Talbot, that no instance can be shewn, where a tenant in tail had been restrained from committing waste, by the injunction of the court.

The privilege of being *sans* waste, will not intitle to commit voluntary waste.

If tenant in tail, or tenant in tail, after the possibility of issue extinct, shall be restrained from committing waste.

\* 541

*Ibidem.*

If A. is tenant for life, remainder to B. for life, remainder to the first and other sons of B. in tail male, remainder to B. in tail, &c. and B. (before the birth of any son) brings a bill against A. to stay waste, and A. demurs to this bill, because the plaintiff had no right to the trees, and none that had the inheritance

## Injunctions.

inheritance was party; yet the demurrer will be over-ruled, because waste is to the damage of the publick, and *B.* is to take care of the inheritance for his children, if he has any, and has a particular interest himself, in case he comes to the estate. *Trin. 1700*, between *Dayrell* and *Champness*. *Pat. Eq. Causes*, 400.

Ibidem.

\* 542

On a motion for an injunction to stay a jointress's tenant in tail, after possibility, &c. from committing waste, it was urged, that she being a jointress within the 11th, H. 7th, ought in equity to be restrained from cutting timber, that being part of the inheritance, which by the statute she is restrained from alienating, and the court granted an injunction against wilful waste in the site of the house, and pulling down houses. *Hilary 1701*, between *Cook* and *Whaley*. *Ibidem*, 400.

Where a woman is to have a jointure of such a yearly value, the court won't prohibit her from committing waste, to make up any defect of it. Nor where a remainder of an estate in fee, after an estate for life is devised to a person paying legacies.

\* 543

But where a jointress, who had a covenant that her jointure should be of such a yearly value, which fell short, though her estate was not without impeachment of waste, yet the court would not prohibit her making waste, so far as to make up the defect of her jointure. *March 1689*, between *Carew* and *Carew*. *Ibidem*, 400. *Sed quer.* if an action of waste be brought against her, if Chancery will injoin the action.

*A.* devised lands, on which timber was growing, to his wife for life; remainder to *B.* in fee, paying several legacies within a limited time, and in default of payment, the remainder to *C.* he paying the legacies; and on a bill brought by *B.* the court gave him leave to cut timber for the payment of the legacies, though it was opposed by the tenant for life, and the devisee over, he making satisfaction to the widow for breaking the ground, by \* carriage, waste, &c. *Trin. 1690*, between *Chaxton* and *Claxton*. *2 Vern. 152.*

Tenant for life in reversion after a term for years, in trust for a man and his wife for life, remainder to trustees for payment of debts, and annuities, allowed to cut timber for his support.

So, where a man created a term for five hundred years in trust for himself and his wife for life, remainder to trustees for payment of debts and annuities, and by will devised the reversion thereof to *A.* for life without impeachment of waste, remainder to his first and other sons in tail male, with remainder over, and *A.* being in want, the court gave him leave to cut down timber to the value of five hundred pounds; though the debts and annuities were not paid, the trustees having no power to sell the timber, the debts being like to have a long continuance, and there being a great deal of decaying timber on the estate. *Hilary 1690*, between *Aspinwall* and *Leigh*, *2 Vern. 218.*

Injunction refused before answer, to restrain the lord

The tenants file a bill against the lord of the manor, to restrain him from digging brick-earth within the waste, in prejudice of their right of common, and the court refused an injunction from digging brick-earth, in the waste, in prejudice of the right of common, and why.

## Injunctions.

injunction before answer, because the soil is the lord's, and the plaintiffs did not swear, that he had not left them sufficient common. *Moseley's Rep.* 172.

\* A man having granted common in his down, for one hundred sheep, and five rams: The bill complained the grantor over-stocked the common, so that the plaintiff, the grantee, could have no benefit of the grant, and prayed the grantor might be enjoined not to overstock, &c. upon debate the court dismissed the bill. *2 Vern.* 116.

\* 544

Bill brought to enjoin the grantor of commonage from overstocking the common, dismissed.

The court will stay a lessee by injunction from doing waste, but not easily a mortgagee; and it is granted against those only, who hold mediately or immediately, under him that prays it. *Chanc. Ca.* 450.

Lessee stayed from doing waste, but not easily a mortgagee, and how the injunction is granted.

On a possessory bill, the court have granted an injunction to the sheriff, on the defendant's allowing exceptions to his answer, to the personal interrogatories for insufficiency, but there must be notice of the motion. *Earl of Shelburn and Ennis* against *Aylmer*, the 8th of July 1760, which was the last of the eight days. But see *Title Possessory Bills*.

Injunction to the sheriff, on allowing exceptions to the answer to the interrogatories.

As concerning the breach of these injunctions, and all injunctions for possession, the parties guilty thereof, are to be proceeded against, and to be punished in the same manner, as in other cases of disobedience to the court, \* or opposing or despising the process or authority thereof. See *Title Contempt and Misdemeanors*.

The proceedings on a breach of the injunction.

But note, that although in an injunction to put the plaintiff in possession, on a decree, there is always a clause to quiet the party from time to time, in the possession, yet it is no breach of the injunction in any person, who is not a party to the decree, to disturb the possession, after the possession is given by the sheriff on the injunction, otherwise, a man who was no party to the decree, and yet had a real title to land, might be for ever debarred from recovering or trying his title. So determined in the *Exchequer*, in the case of *Swan* against *Fitzsimons*, Easter term, 1743.

No breach of an injunction on a decree, if a person, not a party, disturbs the possession.

From whence these possessory bills, and the injunctions thereon originally took their rise, has been already mentioned, but the common opinion being that they are founded on the equity of the statutes against forcible entry, upon these statutes it has been resolved, that, to justify a forcible detainer, there must be,

Possessory bills, and the injunctions thereon, on what founded.

And the requisites to justify a forcible detainer.

*First*, A triennial uninterrupted possession. *Dyer* 141. b.  
Pl. 48.

*Secondly*,

## Injunctions.

\* 546

\* *Secondly,* There must be a title, either by descent or purchase; for confessedly, if there be not a title, or if it appear plainly to be no other than a disseizin, though the party should be forty years in possession, he cannot justify a forcible detainer against the disseizee, after a claim. *Lit. Secq. 427. 430. 431.*

And the title must appear to be still in being, and undetermined; for if it appears to be determined, the party shall not justify a forcible detainer, under a triennial possession. *Cro. Jac. 198. Snigg against Skirton.*

But then it seems that the justices cannot go into a disquisition, touching the goodness or sufficiency of the title, nor is the validity of the title determined, upon an indictment brought on these statutes. *1 Sid. 149. the King against Burgess. Cro. Jac. 633.*

*Thirdly,* The party must shew a forcible entry, or a forcible detainer. *Cro. Jac. 199.*

And these, it seems, are the rules or guide in equity, where they restore and quiet a possession against force; and that he who might justify a forcible detainer at law, and no other, is proper \* to be restored or quieted with respect to force in equity.

\* 547

No privilege of parliament in any suit, or motion for these injunctions.

By stat. 8 Geo. 1 C. 2. S. 2. pars, No privilege of parliament shall be allowed in any suit for wilful holding over of lands, nor in any suit or motion to obtain any injunction or writ of estrement, to prevent waste.

## Of Injunctions to stay Suits and Proceedings at Law.

**RULE.**  
Injunctions to stay suits at law, in what cases granted.

**B**Y the 59th general rule, no injunction is to be granted to stay suits at law, upon priority of suits only, or upon the bare surmise in the bill, but on the defendant's delay, or contempt in not appearing, or answering; or in not perfectly answering, and the same appearing to the court; or on matter confessed in the answer, matter of record, or writing plainly appearing, or the duty demanded very ancient; or when a bill is to be relieved against a debt sued for at law, and it appears the creditor and debtor have been both dead for a considerable time before the action brought.

By

## Injunctions.

\* By the 60th general rule, where a bill comes in after verdict for a debt, or otherwise, an injunction is not to be granted without depositing the principal money, except there appears to the court in the defendant's answer, or by deed under his hand and seal, or otherwise, good matter of relief in equity.

\* 548

RULE.

Injunction after verdict, on what conditions.

If the defendant doth not appear, or answer, in time, when the plaintiff hath entered an attachment against him, he may then give instructions to counsel to move therson for an injunction, which is granted of course; Or if the defendant prays a *dedimus* to take his answer, or moves for time to answer, the plaintiff may enter an order of course, for an injunction to stay the defendant's suit at law, (if any be) till the answer comes in. See *Title Answer*. And the injunction is to be taken out, and served upon the opposite party, and his attorney or agent, in eight days after the rule is entered for the injunction, or the plaintiff may proceed at law, notwithstanding the rule.

Injunction on an attachment, for not appearing or answering, and on the defendant's praying a *dedimus*.

If the defendant against whom the injunction is prayed, refers to the answer of another defendant, who is in contempt, that is a sufficient ground to grant an injunction.

another defendant

The injunction to be served in eight days after the rule, or the plaintiff at law may proceed.

\* These injunctions are only granted until answer or further order; but if the bill was filed after issue joined at law, the court, upon motion of the defendant's counsel, will give the defendant leave to try his action at law, but to stop after verdict.

\* 549

The court will not stop a trial, where the plaintiff is ready for it; but will stop the defendant after verdict. Bill before issue joined to stop proceedings at law, injunction granted, until answer.

And it seems to be the general practice, that if a bill be filed for an injunction, to stop proceedings at law, before issue is joined the plaintiff at law shall be stopped from proceeding to trial, until he shall have fully answered the bill, as it may be, that the defendant at law, who is plaintiff in equity, cannot with safety proceed to trial, without such evidence as it may be, can only be had from the answer of the defendant. But if no such fatality appears in the case, or if it shall appear from the plaintiff's own shewing by his bill, or otherwise, that he either admits, or does not controvert the title of the plaintiff at law, to the matter in question; the court will on motion, give the plaintiff at law liberty to go to trial, notwithstanding the injunction: But if the defendant at law, will consent to judgment, with release of error, they will stop the plaintiff until the hearing of the cause, or further order of the court. It was so determined in the case of *Newcomen* and *Newcomen* against *Walker*, in this court, \* the 7th July 1757, where the defendant *Walker* having brought an ejectment for non-payment of rent, the plaintiffs before issue joined, filed a bill with

\* 550

## Injunctions.

with an affidavit annexed, pursuant to the statute, for an injunction against the defendant's proceedings at law; And in their bill admitted the demise, a constant possession under it, and upwards of a year's rent due when the ejectment was brought; but charged that the defendant's title to the inheritance of the land, had been contested by a third person. And on solemn debate, an order was made to the above purpose.

And on the above motion, it was mentioned by Mr. A. Malone, that the reason why an injunction is granted until hearing, or further order, is, that the plaintiff at law, who is otherwise the defendant in equity, might on the coming in of his answer, dissolve the injunction, and issue execution on the judgment, before the cause could come before the court, upon the bill.

If the plaintiff at law be not ready for a trial, the injunction will stop him.

\* 551

But if the defendant be served with such injunction, and he has not arrested the plaintiff in equity, nor filed his declaration, he cannot, after having been served with such injunction, arrest the plaintiff, nor file a declaration; if he does, until after answer, or further order of the court, he is guilty of the breach of \* such injunction, and the court will commit him.

RULE.  
Proceedings to dissolve the injunction.

By the 61st general rule, where an injunction is granted, until answer or further order, to stop a suit at common law; the plaintiff at law may immediately, upon filing the answer, enter the first rule of course, to dissolve the injunction; without giving notice to the attorney on the other side; and thereupon, four days shall be given the plaintiff in equity, to shew cause after service of the order; and if no cause be then shewn, upon certificate thereof, and on affidavit of the service of the order, and upon motion of the defendant's counsel thereon, the injunction shall be dissolved.

Causes against dissolving the injunction.

But if the contempts (if any) be not cleared, (that is, the costs paid), and all equity denied in the answer; or if exceptions be put in to the answer for insufficiency; any of these are good causes against dissolving the injunction; also, if there be two defendants, against whom an injunction is obtained, the court will seldom dissolve the injunction, until both have answered.

Exceptions to an answer, before a report, a cause for continuing, not for obtaining an injunction.

\* 552

RULE.  
Injunction granted on report of a short answer.

Exceptions to an answer, without a report of its insufficiency, are not a sufficient cause for obtaining an injunction; because they are often put in for \* delay, yet an injunction may be continued on exceptions.

By the 75th general rule, where an answer is reported by a baron to be short, upon motion, in such cases, the court will grant an injunction to stay the defendant's proceedings.

## Injunctions.

at common law, until he makes a full answer, or further order.

Although the defendant should appear, and answer in time, yet the plaintiff may apply to the court for an injunction upon the merits, or the merits; in which case, you must draw a brief of the pleadings for counsel, and give a proper notice in writing, of the motion for such injunction, to the defendant's attorney; and if it shall appear from the defendant's answer, that the plaintiff hath equity on his side, or his case seems hard, the court will grant him an injunction.

And injunctions granted upon the merits, or some special cause of equity, commonly stand until the hearing; nor will the court easily dissolve them, unless the plaintiff be guilty of some unreasonable delay in his proceedings; and although the injunction be dissolved, yet the court will sometimes upon motion, revive it, especially where equity appears evident with the plaintiff, or his <sup>\*</sup> case is hard. But when an injunction is thus granted on the merits, the court generally put some terms upon the plaintiff, as bringing in the money; or paying it to the party subject to the order of court; or giving judgment with a release of errors, and consenting to bring no writ of error; or to give security to abide the order on the hearing, or the like; and to this order is generally added a clause, that the plaintiff shall speed his cause to a hearing.

By the 62d general rule, no injunction shall be granted without special order, and express words, to hinder any extent or execution actually upon the land, or to hinder the defendant from proceeding at law, to evict the plaintiff, nor from making any lease, peaceable entry, or single distress for that end.

In most cases the court have been inclinable to grant or continue injunctions upon the plaintiff's giving judgment at law, with release of errors, speeding the cause, or some such terms, to make the defendant safe; but the best way is, to bind the defendant by order to bring no writ of error, for otherwise, he may notwithstanding bring a writ of error, and so delay time, as if no release of errors had been given. See 1 Vern. 120.

\* It has been doubted, whether, as the plaintiff undertakes to procure a report of the insufficiency of the answer, and it being found against him, he shall afterwards shew cause on the merits; there seems no foundation for such an objection, and it would be extremely severe if it should be admitted; for the plaintiff's counsel may think the answer not full, and yet may be mistaken: And notwithstanding this, the plaintiff may have good cause on the merits for continuance of his injunction, and he ought to be admitted to shew it: But this must be done on notice given to the other side, he cannot do it when

Injunctions on the merits, generally stand till hearing.

\* 553

But in such case, the court generally lay some terms on the plaintiff.

### RULE.

Injunction to stay execution, &c. not to be granted without special order.

Injunctions granted or continued upon giving judgment at law, or other terms.

\* 554

Plaintiff may apply for an injunction on the merits, after the answer is reported sufficient.

But notice must be given thereof.

the

## Injunctions.

the defendant's counsel comes to move to dissolve the injunction, on the answer being reported sufficient; because as this is a motion of course, the defendant's counsel is not prepared to speak to the merits; but he may, and ought to have liberty to do it on notice given.

If the defendant  
swears a certain  
sum due to him,  
the plaintiff is to  
deposit the sum  
if he gets an in-  
junction:

\* 555  
Security some-  
times taken,  
and sometimes  
refused.

Injunction if  
gone, or dis-  
solved, a mo-  
tion must be  
granted to pro-  
ceed at law.

Injunction on  
attachment for  
not appearing,  
or answering in  
time.  
Plaintiff may go  
on with the pro-  
cess, first obtain-  
ing an order for  
that purpose.

Generally, when a defendant in his answer swears a certain sum due, the court will not grant the plaintiff an injunction without depositing the sum; and in some cases the court have admitted the defendant to make affidavit of what was due to him, and have granted the plaintiff an injunction \* upon depositing the sum, and not otherwise.

In some cases, the court have taken security for the money, to be approved of by a baron, and have sometimes refused it; but this is according to the circumstances attending the case, the security is to be by recognizance before the chief baron.

Where an injunction is to stop proceedings at law, and the same is gone by the death of the party, motion must be made (upon notice given) to proceed at law; and it is said, that regularly, in all cases where an injunction is dissolved, a motion of course should be made for liberty to proceed.

Where a bill is filed for an injunction to stop proceedings at law, and the defendant neglects to appear in due time, after the return of the *subpæna*, or to answer in due time after such appearance, the plaintiff may enter an attachment, and move by his counsel thereon for an injunction, which the court will grant him; and after obtaining such injunction, the plaintiff's attorney may move the court, to go on with the process of contempt notwithstanding the injunction, and the court will make an order for that purpose.

\* 556.  
On these injunc-  
tions a recogni-  
zance to be en-  
tered into, and  
the purposes  
thereof.

After injunc-  
tion, if the  
plaintiff would  
amend his bill,  
he should ob-  
tain an order  
for that purpose,  
without prejudice to the injunction.

\* When these injunctions are granted, there ought to be a recognizance entered into by the plaintiff, that he shall not dismiss his bill, and if the cause abates, that he shall revive, and pay what shall be decreed.

In all cases where the plaintiff hath obtained an injunction, and that it is necessary to amend his bill, he should first move the court by his attorney, for liberty to amend the bill without prejudice to the injunction, and the court will thereupon make an order for that purpose. See Title *Amended Bill*.

But if the bill  
be amended to  
continue, or ob-  
tain an injunction on equity confessed,

But where the plaintiff amends his bill, to continue, or obtain an injunction on equity confessed, this is always looked upon

## Injunctions.

upon as a dilatory, and the court will take no notice of the charges or allegations, added by the amendment, un'ess the plaintiff files an affidavit, verifying such additional allegations that they are material, and came to his knowledge since the filing of the original bill: So ordered in the cases of *Baily against Barnewall*, in the *Exchequer*, July 1743; *Barry against Graham*, and another, May 1757, and *Hickson* against the earl of *Shelburn*, June 1758.

\* Though the court will not proceed against a member of parliament, during privilege, yet if a parliament man sues at law, and a bill is brought here to be relieved against that action, the court will make an order to stay proceedings at law until answer, or further order. *i Vern.* 329.

\* 557

The court will grant an injunction against a member of parliament to stop his proceedings at law.

Injunction prevents not an entry.

Bill brought to set aside a will of a personal estate for fraud, the court will deny an injunction to stay the probate thereof, for that the spiritual court has jurisdiction of fraud, relating to a will of a personal estate, and can examine the persons by way of allegation touching the fraud. *2 Williams*, 287.

Injunction upon an attachment, or upon a *deditum*, or upon the defendant's praying time, doth not extend to stay proceedings in the spiritual court, as it does to stay proceedings at law; so that whenever proceedings in the spiritual court are to be stayed, it is to be moved specially. *Quere*, whether the same rule does not hold with regard to proceedings in the court of admiralty. *1 Williams*, 301. But the court will grant an injunction \* to the executor to restrain him from receiving the assets before answer, when a suit is depending in the spiritual court to set aside a will, because that court cannot impound the effects *pendente lite*. *Moseley's Rep.* 236.

receiving the assets, before answer.

\* 558

Injunction to stop proceedings at law, and in the spiritual court.

In the case of *Henry and others against Baxter and others*, in this court, in *Trinity term 1749*, the defendants having moved for time to answer, the court, upon counsel's motion, and on producing a copy of the order for time to answer, granted an injunction to stop proceedings at law and in the spiritual court, the bill being filed for discovery of a will, which was suppressed, and the defendants were proceeding to prove a former will in the spiritual court.

Injunction not always dissolved where a plea or demurrer is argued and allowed.

When a plea or demurrer is argued by counsel and allowed, there is generally, though not always, an end of the injunction; for some equity may be shewn for continuing it arising out of the defendant's answer put in with such a plea

or

## Injunctions.

or demurrer; and upon a plea or demurrer being allowed, or on coming in of the answer, the court will not absolutely dissolve the injunction on the first motion, though upon affidavit of notice, but only nisi; thereby giving the plaintiff liberty to shew \* cause against dissolving the injunction. *1 Harrington's Chan. Pract.* 3d Edit. Vol. 1. 212.

\* 559

Injunction on a  
plea or demur-  
rer.

As by the 59th rule, the plaintiff shall be intitled to an injunction, if the defendant shall be guilty of any delay in not answering, or in not perfectly answering, the plaintiff's bill. Therefore if the defendant shall demur to the bill, or put in any plea to the same, or to any part thereof, which shall appear to be a dilatory, the court upon a motion of counsel for the plaintiff, on the coming in of such plea, or demurrer, (notice thereof being first given to the defendant,) will grant an injunction to stop the defendant's proceedings at law, until the plea or demurrer be disposed of; but if the plea shall appear to be to the right, and not as a dilatory, in such case, the court will be very cautious how the grant an injunction to the plaintiff upon such plea. See the case of lord Howorth against lady Howorth, in *Chancery*, Trinity term, 1752, on a petition.

Injunction said  
to be refused  
whilst a plea or  
demurrer was  
depending.

\* 560

Plea ordered to  
stand for an an-  
swer, defendant  
can only as in  
case of an answer, move to dissolve the injunction.

It is said in *Harrison's Chan. Pract.* vol. 1. pa. 212, that an injunction has been refused whilst a plea, or demurrer was depending; for that until it be argued, it appears not whether the \* court has cognizance of the cause. See *Bunb. Rep.* 11.

RULE.  
Injunction to be  
taken out in  
eight days  
after the order,  
and to stay  
proceedings at  
law, a certifi-  
cate of proceed-  
ings is to be produced. Quær.

Injunctions how  
to be served.

\* 561

By the 63d general rule, in all cases of Injunctions, the same is to be taken out in eight days, and the party is to be served therewith, and if it be to stay proceedings at law, the attorney is not to move without a \* certificate how far the same hath proceeded, and if he that obtains the same, delay proceedings in bringing the cause to a hearing, the court will take that for a good ground to dissolve the injunction.

An injunction is served by shewing it under seal, and delivering a true copy thereof to the party, and the service may be either on the party himself, or his attorney, solicitor, &c or such of them as can be found, or as the case may require. But it has been held that leaving it with the attorney's, or solicitor's clerk; or servant, is good \* service, and this is the method of serving injunctions, in all cases.

\* It is now practised to produce a certificate of the proceedings at law, though this part of the rule seems very proper and reasonable.

## Injunctions.

And if the injunction be shewn, and a copy delivered, the party serving it is not bound to deliver the injunction itself to be compared. *Chan. Ch. 203, Woodward and King.* The injunction itself need not be delivered to be compared.

If the party, or his attorney proceed at law after service of the injunction to stay proceedings, on affidavit sworn and filed of the service thereof, and on counsel's motion thereon, (without notice) the court will grant an attachment against the party, for breach of the said injunction.

If the party is not prepared to defend such motion, the court usually gives him a day to shew cause against such motion; and then, upon hearing the affidavits on both sides, the court usually decides whether the party is guilty of the breach of the injunction or not, and if he be, the court will make the order for the attachment absolute.

And the attachment in this case is directed to the pursuivant of this court; and when the party in contempt is arrested thereon, he is to remain in custody, until he has paid the adverse party his costs, and begs pardon of the court; and sometimes until he has made restitution to him, for the damages he might have sustained for breach of the said injunction: But if the court be of opinion, that the party so charged with the breach of the injunction is not guilty, he shall be acquitted with costs.

Although an injunction be irregularly obtained it ought to be obeyed, or the party is in contempt. *2 Cha. Ca. 203:* But an injunction irregularly issued, may be set aside upon motion: And in some cases, the court will, upon motion, refer the irregularity of issuing the injunction to the officer.

In the case of *Hornby* against *Pemberton*, Michaelmas term 1728, *Moseley's Rep.* 57, the answer being judged insufficient, by the course of the court, the injunction was to continue, and the defendant in the cross cause was not obliged to answer, until the defendant in the original cause had put in a sufficient answer: But the defendant having sworn in his answer, that eight hundred pounds was really due to him, and not being able to put in a further answer from *Constantinople*, where he then resided, in less than two years, the court ordered, that the allowing the exception should not \* hinder the defendant from getting an answer to his cross bill, and that he might proceed at law, so far as to ascertain his debt notwithstanding the injunction.

*Constantinople*, where he resided, in less than two years.

## Injunctions.

Bailiffs who had served an execution, in breach of an injunction, find money hid in the plaintiff's house, and carry it away, and do great spoil to the plaintiff's goods, on application to the court, an order was made, that the defendant should make good his money to the plaintiff, and should satisfy all other damages, which the plaintiff would swear he had suffered to the goods.

Party at whose suit the execution was ordered to make satisfaction.

Upon a bill for an injunction against an ejectionment, distress, or action for rent, if the tenant files a bill for an injunction, it shall not issue for want of an answer, unless the plaintiff shall verify by affidavit, the material allegations of his bill.

The material facts in the bill, to be particularly set forth in the affidavit.

\* 564

Now by the words of this act, it would seem as if a general affidavit, That the material allegations of the bill were true, would be sufficient: But this would be making the party, and not the court, a judge of what was material; besides, upon such an affidavit, the party could not be indicted for perjury, if he swore falsely; wherefore, these words are construed largely, and equitably; and the material allegations in the bill, must \* be set forth particularly in the affidavit, that the court may judge thereof. So determined in the case of *Reynolds against Boyle*, in Chancery, 27th July, 1749.

But if the defendant answers, and it is reported insufficient, the plaintiff shall have an injunction, although he had not made such affidavit. No difference in this case between an injunction for want of an appearance, or an injunction for want of an answer.

And in this case, Mr. Standard said, and it was agreed to by the court, That if the defendant put in an answer, which upon exceptions, should be reported insufficient, that the plaintiff would be intitled to an injunction, although he had not verified the material allegations of the bill by affidavit, pursuant to the statute: for that by the defendant's answering, it appeared he had sufficient opportunity to make his defence. It was objected in this case, that the injunction was originally obtained for want of an appearance, and not for want of an answer, but this was thought to be a distinction without a difference.

In case of abatement a motion to be made to oblige the party to revive, or the injunction to be dissolved.

Where an injunction abates, by the death of either plaintiff or defendant, the court shall be moved to oblige the party for whose benefit it is, to revive within a stated time, or the injunction to be dissolved. 1 Har. Cha. Pract. vol. I. 218.

An injunction to stop proceedings at law, prevents the statute of limitation from being pleaded.

If proceedings at law be stayed by the injunction of this court, the court will preserve the plaintiff's right, and will not suffer the statute of limitations to be \* pleaded in bar to his demand. 2 Chan. Ca. 217.

\* 565

There

## Injunctions.

There is another injunction called a perpetual injunction, A perpetual injunction to quiet a man in possession of his estate, or to prevent multiplicity of suits. for quieting a man in the possession of his estate, and for preventing multiplicity of suits, where one, two, or more verdicts, are gone against a man. This injunction is to quiet the plaintiff, and his heirs for ever, and all claiming by, from and under him, and this is very often granted, and in many instances the justice of the court calls for it.

So where many suits are depending, and are likely to happen from one and the same cause, the court will here interpose, and grant an injunction; they will direct a proper issue to try the whole, and all the rest shall be bound by the verdict; or else there might be twenty actions, and as many verdicts, where one proper direction or issue ends the whole; and it is only directing one issue to prevent many more. For more of these perpetual injunctions, see *Bills of Peace*, under Title Bills. Ibidem.

On a bill taken *pro confesso*, by reason of the defendant's contempt in standing out all process, if it prays an injunction to quiet possession, or to stay proceedings at law, the court will decree a perpetual one. See *Harrison's Chan. Pract.* vol. 1. 216.

Perpetual injunction on a bill taken pro confesso, if prayed.

\* It is said that injunctions for possession, before hearing, hinder not the defendant's suit at law, making a lease, taking a distress, &c. and it may be dissolved on cause shewn, as injunctions in other cases. *Ibidem.*

\* 566

Injunctions for possession before hearing, stop not suits at law.

Special injunction when prayed by the bill, to be moved for by counsel, and the court will settle the injunction.

Where a special injunction is prayed by the bill, and that the plaintiff is intitled thereto, on the defendant's getting time to answer, or on a rule being entered for a *deditum*, there must be a motion made by counsel, on behalf of the plaintiff, (but without notice) for an injunction according to the prayer of the bill, and thereupon the court will direct the prayer of the bill to be read, and will order the injunction in such manner as they shall judge proper. See *Gordon against Austen* and others, in this court, *Hilary 1754*.

Where a bill is for an injunction to stop proceedings at law, and the defendant answers, and exceptions are taken thereto for being short and insufficient, and the defendant allows the exceptions; in this case, the plaintiff shall have an injunction upon a baron's report of a short answer.

If exceptions be taken to an answer to a bill for an injunction, and the exceptions are allowed, the court will grant an injunction.

So if the defendant should put in a further answer, before the exceptions can by the course of the court be referred, the answer be put in, before the exceptions can be referred.

\* 567

## Injunctions.

the plaintiff shall, upon counsel's motion, (notice being first given) and producing a certificate of the proceedings, have an injunction; for the further answer is a full admission, that the first is short, without entering a rule for allowing the exceptions. And it is said, that this case is much stronger than a baron's report, before it is confirmed; besides, the second answer may be as short as the first, and only an artifice to prevent the plaintiff from obtaining an injunction. *Roger against Dwyer*, Easter term, 1759, and *Hudson against Wainright*, 8th July 1760, both in this court, but neither of them on debate\*.

**Exceptions over-ruled, injunction is dissolved without motion.** So where exceptions are put in to continue an injunction, and they are over-ruled, the injunction is dissolved of course, without a motion.

\* 568 Defendant must sign his answer, or injunction may be continued.

Injunction if granted on exceptions to the defendant's answer.

On bill filed for an injunction, to stop proceedings at law, on an ejectment, injunction not to be granted, but on plaintiff's lodging the arrears sworn to be due, and the taxed costs.

\* 569

\* It was agreed *per curiam*, that a defendant ought to sign his answer, or for such defect, an injunction may be continued; but *quer.* if the plaintiff takes a copy of the answer, whether it be not a waiver of that formality? *Bunb. Rep.* 251.

It is said an injunction has been granted, merely on exceptions being taken to defendant's answer, and has been refused according to the circumstances: But where it is granted the circumstances must be very strong, and full notice given. *Sed quer.* See *Bunb. Rep.* 116.

By stat. 11. and ch. 2. f. 4, and by 4 Geo. 1. c. 5. s. 4 where an ejectment is brought for non-payment of rent, pursuant to the said statutes, if the lessee or other person, claiming any right to the said lease, shall within six calendar months after execution executed, file one or more bill or bills, for relief, in any court of equity, such person shall not have, or continue, any injunction against the proceedings at law, or such ejectment, unless he shall within forty days, next after a full answer by the lessor of the plaintiff in such ejectment bring into court, and lodge with the proper officer, such sum and sums of money as the lessor of the \* plaintiff in the said ejectment shall in his answer, swear to be due and in arrear over and above all just allowances; and also, the costs taxed in the said suit, there to remain until the hearing of the cause, or to be paid out to the lessor or landlord, on good security subject to the decree of the court.

\* This seems now to be the settled practice in this court, and in the court of Chancery, upon such further answer the injunction is of course. And yet, if this practice is to be strictly adhered to in all cases, it may be attended with great injury to the plaintiff at law, who may be deprived of his demand, for some, perhaps, immaterial insufficiency, or shortness in his answer. Suppose he hath therein sworn, that a real certain sum is due to him. It is to be wished that no injunction was to be granted, to stop proceedings at law, in any case whatsoever, unless the plaintiff verified by affidavit, his material allegations in his bill.

## Interrogatories, &c.

And in case such bill shall be filed within the time aforesaid, and after execution executed, the lessor of the plaintiff shall be accountable only for so much, and no more, as he shall really and *bona fide*, without fraud or wilful neglect, make of the demised premises, from the time of his entering into the actual possession thereof. And if what shall be so made by the lessor of the plaintiff, happen to be less than the rent reserved on the said lease, then the said lessee or assignee, before he shall be restored to his possession, shall pay such lessor or landlord, what the money, so by them made, fell short of the reserved rent, for the time such lessor or landlord held the said lands.

The lessor of the plaintiff entering, to account for no more than he made of the premises, without fraud or wilful default.

Tenant to pay the deficiency of the rent, if any, whilst the landlord held the lands.

And by stat. 5 Geo. ch. 4. s. 5, on any ejectment, distress or action for rent, if the tenant files a bill for an injunction, it shall not issue for want of an answer, unless the plaintiff shall \* verify by affidavit the material allegations of his bill.

No injunction for want of an answer against proceedings in ejectment, unless plaintiff verifies by affidavit the material allegations in his bill.

\* 57°

## Interrogatories, Examination of Witnesses, Depositions, and Publication.

INTERROGATORIES are questions exhibited in writing by the party, plaintiff or defendant, or directed by the court to be proposed to, and asked of the witnesses in a cause, touching the merits thereof; or some incident therein. Also, interrogatories are touching contempts of writs, processes, and orders of court; whereupon the party offending is to be examined, concerning such contempt. See before *Title Contempt, &c.*

Interrogatories what.

As on hearings upon bill and answer, no evidence is to be admitted, (except matters of record) but what arises from the bill and answer itself; so, when the parties proceed to the examination of witnesses, the cause is determined by such evidence as arises from the depositions of witnesses, examined upon interrogatories. And both the plaintiff and defendant may ordinarily exhibit interrogatories; for when parties are

Both plaintiff and defendant, may exhibit interrogatories, and cross interrogatories.

at

## Interrogatories, &c.

\* 571

at issue, it is necessary to consider as well what \* the other side may examine unto, as what ourselves can prove, and so counter or cross interrogatories may be prepared, if there be occasion.

And by the civil law, a citation was taken out, previous to the examination.

And by the civil and canon law, it was absolutely necessary, that there should be a citation taken out against the defendant, previous to the examination of witnesses; and the reason is, that the defendant, if cited, might either examine, or object to their credibility, or put such cross interrogatories to them, as might bring out circumstances in his favour, which he would not have an opportunity of doing, if he was not cited, but it was not necessary for the defendant to appear, because the citation is in his favour, and he might, if he pleased, renounce a privilege introduced in his favour.

Analogous to it in equity, a subpoena to rejoin issues. But if served before plaintiff replies, he shall pay costs.

Hence it is, that in *Chancery*, after the plaintiff has replied to the defendant's answer, before he proceeds to examine any witnesses, he must take out a *subpoena* against the defendant to rejoin; but if the plaintiff serves the defendant with a *subpoena* to rejoin, before he has filed a replication, the defendant appearing upon such *subpoena*, shall have his costs taxed; because, the plaintiff had not closed the contest of the answer, before he served the *subpoena* to rejoin.

\* 572  
Interrogatories how exhibited at the civil law, and the proceedings thereon.

According to the ancient account of the civil law, it is very plain, that one of the judges of the court himself examined, and therefore he might form the interrogatories out of the *libellus articulatus*, as he pleased: but the actor was at liberty to exhibit interrogatories, founded upon the articles, if he thought proper, but not of necessity: But if any interrogatories were exhibited, not founded on the articles, the depositions taken upon them, were to no purpose.

Ibidem.

But if the adverse party was advised to cross-examine the witnesses, he was to exhibit the interrogatories for the judge to examine upon; because the matter upon which the defendant might cross-examine to invalidate, might not be within the articles. But no copies of the interrogatories were to be given to the adverse party. *Gail*, 194. *3 Maranta*, 273, &c. *Dig. Lib.* 22. *Tit. 3. S. 3. de Test.* p. 728.

Ibidem.

When the judge thus examined upon the articles, and the interrogatories exhibited by the parties, he was to consider, whether the witnesses answered readily, or whether they brought a story formed to him: But the depositions thus taken before the judge were to be kept secret, until publication had passed in the cause. *Corvin. de Test. Lib. 22. Tit. 3.*

This

## Interrogatories, &c.

This was the ancient course of the civil law, and no doubt in our Chancery proceedings, the witnesses were formerly examined by the masters, who sat in court to inform the chancellor of their credibility, until causes so far multiplied, and the masters became so much employed in other affairs, that they left the examination of witnesses to their clerks, as the barons of the Exchequer did to theirs, who from thence got the name of examiners; and from thence forward the judge did not, but the counsel for the party whose witnesses were to be examined, framed the interrogatories upon which the clerks examined.

\* 573  
Ibidem.  
And how they  
were formerly  
proceeded on in  
Chancery.

But as witnesses often lived remote from the court, it was thought more convenient to appoint commissioners, to examine such witnesses, the court sending a notary of their own, who was often in commission with them, and with these commissions they sent a copy of the articles; and these commissioners are themselves to examine, and cannot delegate their power, *for delegata potestas non potest delegare.*

Where the wit-  
nesses lived re-  
mote from the  
court, commis-  
sioners were ap-  
pointed to ex-  
amine.

Who were  
themselves to  
examine.  
They must be  
indifferent.  
They are the  
ministers of the  
court, tho' nam-  
ed by the par-  
ties.

The commissioners are likewise to be indifferent; for upon exception to the partiality of any of them, the court will supply their places, by putting in others; for tho' they are named by the parties, yet that is but by way of \* proposal to the court, for they are the ministers of the court, and therefore must be impartial.

\* 574  
They are to  
have their char-  
ges, and to be  
paid for their  
labour.

And these commissioners are to have their charges, and are also to be paid for their labour, that they may not be damaged for doing their duty; and it hath been resolved, that a commissioner may maintain an action, for the labour and pains he has been at, in the execution of the commission. *Cath.* 208.

The interrogatories were anciently annexed to the commission, and so now they are supposed to be; but by consent of parties, they are delivered to the commissioners at the opening the commission, and this is the present practice.

The interroga-  
tories formerly  
annexed to the  
commission and  
so now supposed  
to be.

The commissioners can only examine upon the set of interrogatories, that are first put in before them, and no new ones can be examined upon before them, without leave of the court; because their commission is to examine upon such interrogatories, as are supposed to be annexed to the commission, or such as are delivered in, at the opening of the commission.

The commis-  
sioners are only  
to examine to  
the interrogato-  
ries, first put in  
before them.

But the examiner may examine upon a new set of interrogatories, because that is presumed to be the examination of the judge, and the judge might \* examine upon interrogatories, *ex re nata*, out of the articles. But see hereafter.

But the examin-  
ers may ex-  
amine upon a  
new set of inter-  
rogatories.

Now \* 575

## Interrogatories, &c.

The credit of depositions much below that of an examination, *viva voce*.

Now since this practice has been used, no doubt but the credit of depositions, *ceteris paribus*, falls much below the credibility of a present examination, *viva voce*; for the examiners and commissioners in such case, do often dress up secret examinations, and set a quite different air upon them, from what they would have, if the testimony were plainly delivered, under the strict examination of a judge in open court.

Yet superior to what a witness said at a former trial,

But though the depositions do fall short of evidence *viva voce*, yet they seem superior to what a witness said at a former trial; for what is reduced to writing by an officer sworn to that purpose, is of more credit than what a stander by retains in memory; for the images of the things in the mind, decay by the perpetual change of appearances, but what is reduced to writing continues constantly the same. See lord chief baron Gilbert's *Treatise of Evidence*, 44. 45. See Bacon's *Abridgment of the law*, vol. 2. 299.

How interrogatories are to be prepared.

\* 576

All interrogatories must be drawn or perused, and signed by counsel and attorney, and are to be ingrossed on parchment, and are then to be brought to the chief remembrancer's office, to \* be entered and signed by the officer, for which you pay one shilling and six pence.

Of producing the interrogatories on examination, before an examiner, or before commissioners.

And if the witnesses are to be examined before an examiner of the court, the interrogatories are to be lodged with him, some convenient time before the examination. If in the country on a commission, the interrogatories may be exhibited before the commissioners, on opening the commission, which (as has been said before) is the general practice.

**RULE.**  
To be to points material, and not leading, and no general interrogatories as to matters material to be admitted.

**RULE.**  
Depositions of a witness on leading interrogatories, to be suppressed, as to that fact.

By the 31st general rule, when witnesses are to be examined, the counsel who signs the interrogatories, is to take care that they be only to points material, and not leading: And no general interrogatories, as to matters material, to be admitted.

By the 86th general rule, if witnesses are examined, on leading interrogatories, the depositions are to be suppressed, as to that fact, upon motion, either before, or after publication; but not at the hearing of the cause, unless by leave from the court, then to move it; but as to any other fact to which the witnesses are examined, on any interrogatories not leading, their depositions to be admitted.

\* 577  
**RULE.**  
And that witness is never to be after examined as to that fact:

By the 87th general rule, where the depositions of any witness are suppressed, touching any fact, he is never after to be examined, on any interrogatories, touching the same fact;

But the court may direct a trial at law.

## Interrogatories, &c.

but the court may at discretion appoint a trial at law, especially where it appears, that such leading interrogatory, was drawn by mistake of the counsel, and not to entrap witnesses. See the 88th general rule, *Title Pleadings*.

## Commission to examine.

THIS is either to examine the parties, or witnesses, or others; as contemnors, &c.

Commission to examine, what.

A commission to examine witnesses, is sometimes to examine them to the cause, i.e. as to the merits thereof, or to some particular point in question; or it may be to examine them, touching a contempt, or the breach of some order of court, &c. examination to the cause, is generally before hearing, though sometimes it may be after hearing, as upon an account referred to the officer, or upon new matters arising at the hearing.

In what cases.  
To the merits.

In aid of an account.

\* A commission may issue to examine witnesses beyond seas, and then, if they be foreigners, or natives, to examine them on their oaths, and the oaths of skilful interpreters.

\* 578  
To examine beyond seas.

A commission is also had to examine witnesses in perpetuum *rei memoriam*, touching which, see under *Title Bills*.

Or in perpetuum rei memoriam.

And though a commission to examine witnesses, is not ordinarily to be granted, until the cause be at issue; yet if a witness be very aged or sick, upon making an affidavit thereof, the court will sometimes order it *de bene esse*, even before answer. See under this *title* hereafter, the whole proceedings.

De bene esse.

By the 33d general rule, no commission to examine witnesses, is to be executed in Dublin, or within twelve miles thereof, without special order first obtained, upon affidavit made of their inability to travel, or other good matter; and that all commissions taken in Dublin, or within twelve miles thereof, without special order as aforesaid, shall stand suppressed *ipso facto*, and not allowed to be read in evidence, upon the hearing.

RULE.  
Commissions to examine, not to be executed in Dublin, or within twelve miles of it.

And by the 34th general rule, where the plaintiff and defendant join in commission, for the examination of witnesses, in commission, plaintiff has regularly the carriage of it, but if he neglects to execute it, he shall pay such costs as the court shall judge reasonable; and so likewise, where the defendant has the carriage of it.

RULE.  
If plaintiff and defendant join in commission, plaintiff has regularly the carriage of it, but if he neglects to execute it, he shall pay such costs as the court shall judge reasonable; and so likewise, where the defendant has the carriage of it.

the

## Interrogatories, &c.

\* 579

Where the defendant suspects the plaintiff will not execute the commission, he may have a duplicate of it, and may prosecute the same, as the plaintiff should have done.

The defendant is to move for the duplicate.

Plaintiff may have several commissions, to several counties.

\* 580  
The court sometimes fix a place for executing the commission.

Of naming and striking the commissioners names.

RULE.  
On what terms a new commission shall be granted, if the witnesses of either party be not all examined on the first.

If plaintiff examines in town, defendant may have a commission in the country; and on what condition defendant shall have a commission after the plaintiff hath examined his witnesses.

the plaintiff is regularly to \* have the carriage of it; but if through his own default, or the default of his commissioners, the same be not executed, he shall pay the defendant such costs, as the court (being satisfied of such default) shall think fit, and then he may renew his commission, by order of court, at his own charge; and the plaintiff to have the like, on default of the defendant, or his commissioners, in case he have the carriage thereof. And where any defendant hath joined with the plaintiff, in taking out a commission, and finds cause to suspect, that the plaintiff will not have the same executed, the defendant, upon affidavit to that effect, may take out a duplicate thereof, at his own charge, and giving the usual notice thereof, may prosecute the same to a due execution, and return, as the plaintiff should regularly have done.

The plaintiff has regularly the carriage of the commission, and so is to appoint time and place; but if the defendant has cause to suspect, that the plaintiff will aggrieve by such appointment, he may move by his attorney, for a duplicate of the commission, and that the officer might appoint time and place, and it shall be granted him.

A plaintiff may have several commissions, to several counties at once.

\* The court sometimes fix a place, for the commissioners of both parties, to meet and execute their commission.

There are to be four commissioners, but the plaintiff and defendant name four a-piece, and each party strikes out two, the plaintiff is to name the first four.

By the 35th general rule, if both parties join in commission, and the one party examine all his witnesses, and the other not, but prays a new commission, it shall not be granted, unless the other party be content, or upon oath made of good cause, why he could not examine all his witnesses, at the execution of the former commission.

If the plaintiff examines in town, the defendant is intitled to a commission in the country, and the court will order it on motion of his attorney. If the defendant be under no obligation to appear *gratis*, upon the hearing, and the plaintiff has examined his witnesses, but does not procure a rule for publication *absque*, until after the sixth day of term, then the defendant, upon motion of his attorney, and upon his engaging to appear *gratis*, on the hearing, and suffer no conditional decree, shall generally have a commission \* though he affirms no sufficient reason, why he could not examine the same vacation the plaintiff did.

\* 581

## *Interrogatories, &c.*

It is said, there ought to be no examination of witnesses in term time. No examination in term time.

If the plaintiff has no witnesses to examine, he usually puts a rule on the defendant, to examine the ensuing vacation, or that the cause should be heard on the pleadings the next term; but the short vacation between Easter and Trinity term, is not a vacation to examine. How the plaintiff is to proceed, if he hath no witnesses to examine.

If the defendant makes default, and desires a commission, the plaintiff may have an injunction; so determined in the case of *Barry against Martin*, in this court, 1st June 1733. On defendant's default and desiring a commission, plaintiff may have an injunction.

By the 19th general rule, the defendant being served with a *subpoena* to rejoin, the plaintiff is of course (upon producing an affidavit thereof) to have an order for the defendant to rejoin and join in commission in four days, giving the defendant's attorney notice thereof; and the plaintiff may in eight days after, leaving the names of his commissioners in the office, have at his own charge a commission *ex parte*, directed unto two of the plaintiff's commissioners and to two more such as the chief remembrancer shall think fit to \* nominate; and if the defendant's attorney (having notice of it in town) doth not in that time name commissioners for the defendant, and pay half costs for the commission, if afterwards the defendant will desire to examine any witnesses of his side, he shall be barred from having any commission without special order of court.

RULE.  
Commission ex parte in what case granted.

\* 582

Defendant lapsing his time of joining in commission, shall not afterwards have a commission without special order.

The four days to rejoin are running days.

It was determined by this court, in the case of *Delarze against Lewis* on a motion to set aside the officer's report, and on full debate, that the four days are running days; and that the rule to rejoin may be entered immediately after service of the *subpoena* to rejoin, without waiting four days as was formerly thought. See *Title Replication and Rejoinder*.

The

The Method of settling Commissioners Names, for the Examination of Witnesses, is thus.

The method of settling commissioners names for examination of witnesses.

\* 583

THE plaintiff's attorney is to leave a note in writing, in the proper office, of the four commissioners named by the plaintiff, with their christian and surnames, additions, and places of abode, and the place where the commission is to be executed; then he must serve the defendant's attorney with a notice of such names being left in the \* office, desiring him to return the names of his commissioners in the proper time; then the defendant's attorney generally strikes out two of the plaintiff's commissioners, and returns the remaining two, with the names of four commissioners, with their additions and places of abode as aforesaid, for the defendant, out of which the plaintiff also strikes two, and the four commissioners which are thus settled by both parties, are to be inserted in the commission, for the examination of witnesses.

The method for settling commissioners names for taking of an answer.

Commission ex parte in either case, if names be not returned in time on application to the officer.

The officer gives notice to the opposite party before he issues a commission ex parte.

\* 584

Time given by the court to return commissioners names.

How to manage if several defendants are to be served with commissioners names who have different attorneys.

The like method is to be pursued by the defendant, upon taking out a *deditus* to take his answer in the country, but that in this case the plaintiff hath but four days to return the names of his commissioners after being served with names for the defendant.

And if in either case, names be not struck and returned in the limited time, the officer of the court will, upon application, of course, name two commissioners for the party making default, and issue a commission *ex parte*, of the execution of which no notice is required to be given.

But note, before the officer so strikes, or names commissioners for a commission *ex parte*, either to take an answer, or examine witnesses, he first gives notice thereof usually twenty-four hours, \* to the attorney for the party making default.

If when the attorney is served with commissioners names, he has not time in the four days on commissions to take answers, or in the eight days on commissions to examine, to get a return from his client of names, for him, it is usual to move for a reasonable time, if it be in term, to send to his client.

If there be several defendants, who have different attorneys, the court, upon motion of the plaintiff's attorney, will order that the attorneys for the defendants, do join in striking the names of the commissioners, for the examination of witnesses, and the attorneys for the several defendants, are to be served with the names of the commissioners, and also with this order,

## Interrogatories, &c.

and the names of the commissioners are also to be lodged in the office as aforesaid; and if the attorneys for the defendants, do not comply with the order in eight days after service thereof, and in the names of commissioners for the plaintiff; the officer will, on affidavit of such service, strike commissioners for the defendants and give the plaintiff a commission *ex parte*. Commission ex parte.

The officer generally strikes the names of commissioners for the defendants, without any affidavit of the \* service of the order, or of the names for the plaintiffs; but a prudent agent, should have such affidavit ready to produce at all times, and also of the service of the rule to rejoin. Ibidem. \* 585

All commissions for examination of witnesses are to be made returnable on one of the return days, unless where the parties agree to have it returnable without delay, or where an order is obtained for that purpose: And when a commission is returnable without delay, if it be within the kingdom, it must be returned by the second return of next term; if executed afterwards it is void, and the depositions ought to be suppressed. Commission when to be returnable. Commission fine delacione. When to be returned.

Per Cur. 2 Vern. 197.

And no commission can be executed in term time, unless by leave of the court or by consent. Commission not to be executed in term time, but by order or conside.

He who has the carriage of the commission, must give fourteen days notice signed by his commissioners, of the time and place for executing the commission, to the opposite party, exclusive of the day of serving the notice, that he may apprise his commissioners thereof; and such notice must be given to all the defendants who join in such commission, otherwise it is not good notice; and the depositions may be suppressed for irregularity. But personal notice is not necessary: And in default \* of notice, the court will grant the other side a new commission, or in case of the plaintiff's refusing to give notice, the defendant having a duplicate of the commission, may use it. But note, the names of the witnesses need not be delivered to the other side, which must be, where the examination is in town before an examiner. What notice is to be given of speeding the commission.

execute it; but the names of the witnesses need not be delivered to the examination be in Dublin.

If notice is directed to be given to a person you cannot find, then on affidavit thereof, and filing it, you may, on motion, obtain an order for the officer to appoint time and place.

On default of notice, the court will grant the other party a new commission, or the defendant, having a duplicate, may use it. How to manage if the party to be served is not to be found.

\* 586

The

## Interrogatories, &c.

### The Notice of executing a Commission.

Form of the notice.

A. B. and others } WHEREAS we have received a commission out of the Chancery side of  
plaintiffs. T. M. and others } his majesty's court of Exchequer in Ireland  
defendants. bearing test, the day of last past, and returnable into the said court next ensuing, to us, and to H. H. G. H. or any two or more of us directed for examination of witnesses in this cause; these are therefore to give notice, that we will execute the said commission at the house of in the county of commonly called or known by the name or sign of on the day of between the hours of and of the clock in the noon of the said day, where\* you, together with your commissioners and witnesses may be present if you think proper. Given under our hands the day of

\* 587

To the defendant T. M. and the other defendants or Mr. H. H. and Mr. G. H. two of the commissioners in the said commission or any of them.

E. M.  
P. M.

And the witnesses are also to be served with a summons to appear before the commissioners at the time and place appointed for executing the commission, to depose their knowledge to each interrogatory; which summons is in this form.

### A Summons for Witnesses to appear.

Form of the summons to appear.

B. D. and others } WHEREAS, &c. (as before) And whereas we are informed that you, whose plaintiffs. F. M. and others } names are under-written, are material defendants. witnesses for the plaintiff (or defendant as the case is) in this cause. These are therefore by virtue of the said commission, to will and require you, and every of you, to be and appear personally before us, or ony two or three of us the said commissioners, at the house of, &c. (as in the former notice) and you are then and there to attend, and not to depart until you have been examined, and have testified your knowledge for, and on behalf of the plaintiff (or defendant) and herein you are not to fail. Given under our hands, the day of, &c.

\* 588

To W. R. and P. T.  
witnesses.

E. M.  
P. M.

N. B. Mention their additions.

Subpoena to testify, and how to be served.

If a witness be unwilling to come, you must then issue a subpoena ad testificandam, and let a copy be made thereof, and thereto subscribe the above summons, and put the names of your commissioners thereto; and let the witness be served therewith,

## Interrogatories, &c.

therewith, as *subpensas* to answer are served, some reasonable time before the execution of the commission, according to the distance of his place of abode, from the place where the commission is to be executed.

By the 85th general rule, if a witness be served with a *subpena ad testificandum*, to appear before a baron, or commissioners, and fail to appear; upon affidavit made thereof, an attachment, upon counsel's motion, shall issue to the pursuivant, provided the witness be tendered reasonable travelling charges; but if a witness be served in the city of Dublin, with *subpna* to appear before a baron, then only a shilling is to be tendered to the witness. only to a witness served in Dublin, to appear before a baron.

### RULE.

An attachment against a witness for refusing to appear, after service of subpoena, and being tendered reasonable charges, and one shilling before a baron.

\* But sometimes the court do fix some certain time for the witness to come up, and be examined, at his own expence, otherwise an attachment to issue against him, without further motion. But note, if the examination be in town, it is usual to have a certificate from the examiner, that the interrogatories are lodged with him, and that the witness did not attend. Certificate from the examiner, that the interrogatories are lodged, and that witness did not attend.

\* 589

Or will first order the witness to attend, to be examined at his own expence.

Or if a witness be summoned by the commissioners, without a *subpna ad testificandum*, and do not appear, the court will order such witness to attend, and to be examined; and if he disobeys such order, then an attachment shall go against him. *vid. Reg. 89, 90.* For the commissioners are by their commission, not only authorized and empowered, but commanded to cause the witnesses to come before them, and examine them upon the interrogatories to be exhibited to them.

If a witness be only served with a summons, not with a subpoena, and disobeys, the court will order him to attend, to be examined, and if he disobeys will attach him.

The commission to be opened, on the meeting of the commissioners.

The commissioners and witnesses being met together, at the time and place appointed, according to the notice; the commission (which till that time must remain sealed) may be opened, that the commissioners may see that they have an authority, and sufficient warrant to justify their proceedings.

\* The commissioners for examination of witnesses, shall take an oath before the execution of any commission, to execute the same faithfully and impartially, and not to publish or divulge the same, until publication be passed by order of court; which oath, each commissioner is empowered to administer to the other; and the clerk, or clerks attending such commissioners, shall take an oath, which is to be administered by the commissioners, to write down the depositions of witnesses, truly and indifferently, without partiality, and not to divulge the same until publication and a clause shall be inserted in the commission for that purpose,

\* 590  
The oath to be taken by the commissioners, and by their clerk, on the commission.

There

## *Interrogatories, &c.*

Plaintiff's commissioners may not be executed; but in case the commissioners named by the defendant do not appear, if his interrogatories are produced, and his witnesses attend, the two commissioners named by the plaintiff, if they attend, may as well examine the defendant's witnesses, as those for the plaintiff; and it is a very mistaken notion amongst commissioners, if they think they are to be advocates for the party, by whom they are named, for they are the ministers of the court, and are equally concerned for both.

\* 591

If the plaintiff's commissioners do not attend, and he having the carriage of it, will not produce it, the defendant cannot proceed, unless there be a duplicate.

\* But if the defendant's commissioners attend, at the time and place appointed, and the plaintiff's commissioners are not there, they cannot go on, if the plaintiff, having the carriage of the commission, will not produce it: This makes a duplicate of the commission most necessary, for in that case, if the defendant's two commissioners, or any two of the four commissioners, attend, they may proceed in the execution of the commission.

\* RULE.

Commissioners and examiners, are themselves to examine, and not to trust to clerks.

The duty of commissioners and examiners; In examination of witnesses.

\* 592

By the 31st general rule, the commissioners and examiners (whose duty it is,) are themselves to examine, and not to trust the same with inferior clerks, and are to take care to keep the witness to the point interrogated, not permitting him to run into extravagancies.

When a witness is produced, he is first to be examined upon the interrogatories of the party producing him, and then forthwith, (without suffering him to go abroad) upon the cross-interrogatories of the other side. And the examiners and commissioners are to take care, that they do not permit any witness to read over the interrogatories, or suffer any witness to have them in his custody, before he be examined, or open his own depositions, or depart before he be fully examined. And when his examination is finished, he \* is to sign the diminicles, or paper draught, of the depositions he has given.

Commission not to be suppressed, but for irregularity; but the court will attach the commissioners for misbehaviour.

The court will not suppress a commission, but for some plain irregularity in the issuing or executing of it; but if any of the commissioners obstruct the others in the examination of the witnesses, or misbehave therein, or in any other respecting the execution of the commission, the court, upon complaint thereof by the injured party, set forth by a proper affidavit, and upon the other commissioners certifying the particular misbehaviour, will, on counsel's motion, and on due notice given, award an attachment against the party offending. And note, the certificate of the commissioners, shall be sufficient without their affidavit; because being officers of the court

## Interrogatories, &c.

*pro hac vice*, they are allowed to certify; but there must be an affidavit produced of the party complaining, otherwise the court will take no notice of the certificate; because the commissioners are appointed for another purpose, and not to certify to the court, but of necessity.

Commissioners have been attached for receiving the depositions of witnesses ready drawn.

\* And in the case of *Reilly* and *Reilly*, the commissioners were attached for refusing to examine a witness, because he was illiterate, and the witness was afterwards examined, by an examiner, by order of court, *Trinity term, 1743*; but in this case, the facts were verified by the commissioners, by affidavits.

And upon complaint of an irregular examination, an examiner has been ordered to answer personal interrogatories, and not admitted to have a copy of them.

By the 36th general rule, commissioners and examiners of the court are to take care, that after a witness is examined, his examination be by him read over, or carefully read over to him; and then each witness is to subscribe his own \* depositions, after which no alteration is to be made thereof, without order of the court; and the commissioners are to take care, that neither they, nor their clerks, make any discovery of any matter depos'd before them, until publication be had in the cause, by order of court; and the commissioners and examiners are to set down the examination of every \* witness at large, without referring the testimony of one, to another; and are to be careful that no impertinent or needless repetitions be set down, nor is any answer to be set down, otherwise, (to such interrogatories to which the witness is produced and cannot at all depose) than thus, 'To such interrogatory deponent cannot depose.'

A witness examined at a commission swears reflecting words, it was determined he ought not to pay costs, it being the fault of the commissioners to take down such depositions. *Williams, 506.*

A commissioner may be examined as a witness, but then he must be first examined; and if others be examined before him in his presence, he cannot be examined afterwards, having heard the depositions of the witness first examined; and for this reason, a commissioner was examined in court, his former

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E

former

\* It would be proper that the witness should sign every sheet of his depositions in the paper draught.

Commissioners attached for receiving depositions ready drawn.

\* 593  
Commissioners attached for refusing to examine an illiterate person.

Examiner ordered to answer personal interrogatories, for an irregular examination.

RULE.  
Further duty of examiners, and commissioners in the examination of witnesses.

\* 594

If a witness swears reflecting words, the examiners to blame, if they be taken down.

A commissioner may be examined as a witness.

## Interrogatories, &c.

former depositions being suppressed; for if it were otherwise, a commissioner might lie in wait, and after having knowledge of the depositions might by his oath contest the same. *2 C. Ca. 68. 79.*

Witnesses and their depositions, how to be set down.

The names and additions of the witnesses, &c. and their depositions and answers, are thus put down.

\* 595      \* A. B. of                  in the county of                  gent. aged          years and upwards, being produced, sworn and examined, on the behalf of the plaintiff, (or defendant) deposeth as followeth.

To the first interrogatory this deponent saith that, &c.

To the second interrogatory this deponent cannot depose.

To the third interrogatory not produced.

And so proceed through the rest of the interrogatories, as the case is.

The stile of the depositions.

The stile to be fixed to the dominicles, and ingrossment, is the same with the indorsement, on the wrapper, in page 596 but that you add the test and return of the commission.

Adjournment of commission to another day and place, how to be set down.

If a commission be adjourned to another day, and place, and witnesses are examined, the time and place where such examinations are taken, ought to be mentioned, and set down in the title of the depositions.

\* 596

The commissioners ought not to adjourn without necessity, because that would be to harass the defendant, by obliging him to travel from place to place, to cross-examine; but if it be necessary they may adjourn both in time and place.

And this affair should be performed as much as possible, *uno actu*, that there may be as little opportunity as possible, to divulge their depositions, by which either side may better their proof.

Writings proved, and exhibits made of them.

If there be any writings directed by the commission to be proved, the commissioners are to give directions to bring them in for that purpose; and after they are proved, exhibits may be made of them.

And the exhibits must be indorsed after the following manner.

## Interrogatories, &c.

5th March 1746.

A. B. { AT the execution of a commission for the ex-  
plaintiff. } The examination of witnesses in this cause, this  
C. D. { deed (or parchment or paper-writing) was pro-  
defendant. } duced and shewn to E. F. and by him depos-  
into, at the time of his examination, to the third interrogato-  
ry, on the plaintiff's part; and was also produced and shewn  
into, &c. and by him, depos'd, &c. before us,

G. H.  
J. K.

\* When the witnesses are examined, the depositions with the  
witnesses names thereto, are to be ingrossed on parchment,  
in like manner as the interrogatories, and to be examined  
carefully with the paper draughts; after which the commissi-  
oners only, not the witnesses, sign such schedule, or skin of  
parchment of the examinations and also the interrogatories;  
and then bind them up with the commission, and the paper  
draught or dominicles \* (usually called, making up the com-  
mission) with some tape or other string, setting all their names  
and seals, upon the same; but before the commission is sealed  
up, they are to indorse upon the back of the commission, to-  
wards the middle thereof, the execution, to which they sub-  
scribe their names as followeth:

\* 597  
The ingrossing  
the depositions,  
and making up  
the commission.

The return of  
the commission.

The execution of this commission appears  
in a certain schedule or schedules to this  
commission annexed.

G. H.  
J. K.

\* When the commission is executed and made up, as afore-  
said, the commissioners must deliver the same personally, to  
the person who is to bring it to town; who is to deliver it to  
baron in town, and to make oath that the commission has not  
been opened, or altered since he received the same from the  
hands of the commissioners. And note, the commissioners  
are to be very careful, with whom they intrust the packet, for  
the commission they are to return it to the court.

\* 598  
How to be deli-  
vered to the per-  
son who brings it  
to Dublin, and  
the oath he is to  
take upon it's,  
being received.

But if the commission is carried by one of the commis-  
sioners, no affidavit is required; and you need only indorse  
thus,

But if brought  
up by one of  
the commis-  
sioners, he is not to  
take any oath.

\* I cannot find this word, as it is here spelled, in any Dictionary extant;  
any word like it, except the word *Dominical*, which has a signification  
relative to what the above word is here intended to express, to wit,  
first draught of the depositions, and it is thus spelled in every com-  
mission.

## Interrogatories, &c.

But it must be  
so indorsed.

25th March 1747, received by the hands of G. H.  
one of the commissioners.

### The Form of the Indorsement on the Wrapper.

Form of the in-  
dorsement on  
the wrapper,  
when the plain-  
tiff has the car-  
riage of the  
commission, and  
the defendant  
joins in the ex-  
amination.

A. B. and others, } D EPOSITIONS of witnesses, taken at  
plaintiffs. } the house of in the  
C. D. and others, } town of in the county of  
defendants. } the day of by virtue  
of a commission issued under the seal of his majesty's court  
of Exchequer in Ireland, for the examination of \* witnesses in  
this cause, as well on the part of A. B. plaintiff, as on the  
part of C. D. defendant.

\* 599

The like when  
the defendant  
has the carriage.

Note, when the commission is obtained on the part of the  
defendant, and the plaintiff joins therein, the words of the  
commission and label are, *as well on the part of C. D. defendant,*  
*as on the part of A. B. plaintiff.*

The like on an  
ex parte com-  
mission.

If it be an *ex parte* commission, then the words are, *on the*  
*part of the plaintiff, or the defendant, as the case is.*

### The direction to be indorsed on the wrapper.

The direction.

To the right honourable the chancellor, treasurer,  
lord chief baron, and the rest of the barons of  
his majesty's court of Exchequer in Ireland.

RULE.  
Depositions,  
&c. not to be  
divulged before  
publication, ex-  
cept to the de-  
ponent, or to the  
baron, before  
whom he is ex-  
amined.

By the 37th rule, all commissioners and examiners, are to  
take care, that they do not make it known, directly, or in-  
directly, by writing, or otherwise, to the adverse party, or  
any other, any of the interrogatories delivered, or depositions  
taken on them, before publication be passed, and copies of  
them taken out, save only to the deponent who comes to be  
examined, or to the baron before whom he is examined, if he  
requires it.

\* 600  
Dominicles to  
be returned  
with the in-  
grossed deposi-  
tions.

\* Notwithstanding the above rule, it is very well known,  
that the parties did frequently come to the knowledge of the  
depositions, by means of copies taken from the dominicles, or  
paper draught in the commissioners hands; to remedy which,  
a rule was made, that the commissioners should return the  
dominicles, together with the ingrossed depositions.

Depositions not  
to be opened or  
copied till pub-  
lication.

On delivery of the commission, the examinations or depo-  
sitions are not to be opened or copied, until publication be  
actually passed.

The solicitor's  
clerk not to en-  
gross the depo-  
sitions.

Depositions have been suppressed, because the solicitor's  
clerk ingrossed them.

## Interrogatories, &c.

So where they have been taken before the plaintiff's solicitor, who was one of the commissioners, the court have ordered the solicitor to pay all the costs, or an attachment to go against him. *Bunb. Rep.* 289.

The solicitor for the plaintiff not to be a commissioner.

It is said, it has been objected in this court, that a commissioner was a papist, and allowed. *Quær.*

A papist object ed to as a com missioner.

A commissioner may be a clerk on the commission, but in this case, it is said, there must be two commissioners to swear him.

A commissioner may be clerk on the com mission, but two commissioners must swear him.

\* If by default of him that has the carriage of the commission, nothing is done thereon, he shall bear the charges the other side is put to about it, either for fees of court, or retaining commissioners, or witnesses, or otherwise, to be ascertained by the oath of the party, or him that disbursed the money for him, and shall renew the commission at his own cost.

\* 601

New commissi on, if by default of him that has the carriage of it, nothing be done, and he to pay all costs, and to renew the commission.

If there be due notice, of executing a commission, and at the day appointed the commissioners meet, and the commission is opened, and no witnesses examined, nor adjournment made, the commission is lost; except the other side agree to adjourn, or to take new notice; but if it be not opened, they may give new notice, and proceed, unless in the mean-time, an order of court be obtained, to pay the cost of the former day, before they proceed: And the reason of this rule seems to be, that the not adjourning is a refusal of the commissioners to act any further upon it, besides their power to adjourn, arises from the words of the commission, which are, *We command you, &c. that at certain days and places, you do cause the said witness to come before you, &c.* so that if they do not provide time and place by an adjournment, they have no authority further to act\* by that commission; for the delegated authority must pursue the words of the commission; or else it will be construed as a refusal to act: But if they do not open the commission, their not acting at that time will not be construed as a refusal to act; besides, until the commission be opened, they do not know what their authority is; but it is an harassing of the defendant, for which he may complain to the court, and have his redress. *Prax. Alm. Cur.* 83.

\* 602

Where one of the plaintiff's commissioners, and one of the defendant's meet, and the commissioner for the plaintiff refuses to act, the commission is lost; but the plaintiff shall pay the defendant his costs, and the defendant shall have a new commission, and the carriage of it; and so it is, when any

When any com mission is lost, through default of him who has the carriage of it, he shall pay costs, and the other party shall have a new commission.

commission

## Interrogatories, &c.

commission is lost, through the default of him that has the carriage of it; for he is unworthy to have the carriage of the commission, who appears to make a default in the execution of it. *Pract. Regr.* 87.

If one side examines, and the other side makes default, and prays a new commission, on what terms it shall be granted, either where his commissioners do or do not attend,

\* 603

After due notice has been given, if the one side proceeds, and examines his witnesses, the other party if he does not examine, shall not have a new commission, unless affidavit be made by the party who did not examine, of some reasonable cause for his not examining, and that neither he, nor any for him, or by his directions, or knowledge, have seen, heard, read, or been informed of the depositions taken, or any part of them; nor willingly will see, &c. until he has examined or until publication. This is, that the defendant may not have the advantage of knowing what has been proved for the plaintiff, and so have an opportunity to contest it. But if on such commission, the commissioners for both sides attend, and the defendant produces no interrogatories, the court will be very cautious how they grant him a new commission; because he might form his interrogatories upon the discoveries made to his commissioners, of what the other side examined to. *Pract. Regr.* 89.

He is to pay all the costs of the new commission.

Unless the other side produces witnesses.

And he is to examine all his witnesses on the new commission.

\* 604

The charges attending the execution of such commission to the other party, to be paid, or the depositions not to be read.

A new commission where witnesses do not appear.

And where such new commission is granted, it shall be entirely at the charge of him that prays it, and the other side shall cross-examine without charge.

But if the other side will upon such new commission produce any witnesses, he must be at equal charges, because he has equal benefit by the examination.

And note, that he at whose instance the commission is renewed, must examine all his witnesses upon such new commission, or in court, before the \* return of it; because he shall not be indulged a further probatory term. *Pract. Regr.* 89.

If the other side produces no witnesses, and he at whose instance the new commission is granted, refuses to pay him his reasonable charges, and to reimburse him what he has reasonably expended, in attending the execution of such commission, on complaint thereof, the court will not suffer the depositions taken on such commission to be read, until the charges reasonably expended, to be ascertained by the oath of the party, or of him who disbursed the money for him, be discharged.

Where the witnesses are duly summoned, but do not appear, a new commission may be had upon oath thereof.

Certain

## Interrogatories, &c.

Certain exhibits of writings which were given in at a commission for examination of witnesses were altered, and interlined, since the commission executed; a new commission was granted to examine as to this matter, but not as to the merits on new interrogatories. *Hill. 25th. Car. 2*, between *Richardson* and *Lowther*, 1 *Ch. Ca.* 273; tho' it was objected that the party had a commissioner present, and that he could not know it, but by the discovery of his commissioner who ought not to discover the examination.

New commis-  
on, if exhibits  
of writings are  
altered or inter-  
lined.

\* But where a witness alledged that he had mistaken himself at a commission, and a commission being returned, he came to London and made oath that he was surprized, upon which a special commission issued to examine the witness, which was done accordingly; but this special commission was suppressed by the master of the rolls by the advice of the six clerks, as contrary to the course of the court. 1 *Ch. Ca.* 25.

\* 605

No new com-  
mission where a  
witness has mis-  
taken himself.

But the court will grant an order on motion and affidavit of surprize, to have the witnesses examined *viva voce*, in court, or his depositions amended, the witness being first examined before an examiner; but when he is examined in court, or when his depositions are read, the order for that purpose must be produced in court. *Bac. Eq. Ca.* 102.

But he may be  
examined *viva  
voce*, or his de-  
positions amend-  
ed, being first  
examined by an  
examiner.

A mistake in  
a deposition  
amended after  
publication.

Where it appears to the court, that either the examiner is mistaken in taking the deposition, or the witnesses in making it, such deposition shall be amended after publication, and the witness to swear it over again; so determined in the case of *Griels* against *Gansel*, 2 *Williams* 647. And lord chancellor King there declared, that it was for the advancement of truth and justice, that the mistake should be amended, and the sooner the better, in regard \* the witness may be dead, or in remote parts before the hearing; and it would be hard and unjust to pin the witness down to what is a mistake, by denying to rectify it; and as to the objection of the inconvenience of amending a deposition after publication, it was impossible to know the mistake until publication.

\* 606

And in the case of *McClenahan* against *Magee* and others the 26th day of February 1747, after the cause had been heard, and a decree to an account, the court, on counsel's motion, on notice on behalf of the plaintiff, ordered that the ingrossment of the depositions should be amended by the *Dominicles*, by adding to the ingrossment the names of the witnesses signed to the *Dominicles*, but omitted in the ingrossment, by neglect of the clerk, who ingrossed the depositions.

The names of  
the witnesses  
affixed to the in-  
grossment from  
the dominicles,  
after publica-  
tion.

A general affidavit of having material witnesses beyond seas, shall not be sufficient for a new commission, but the witnesses Affidavit of hav-  
ing witnesses  
beyond seas for  
a new commission what to contain.  
must

## Interrogatories, &c.

must be named in the affidavit, and the point mentioned, to which they can materially depose. 1 Vern. 334.

On a new commission no additional interrogatories allowed but in special cases.

\* 607

Witnesses not twice examinable.

And in all cases where a new commission is granted, care must be taken that neither party add to or alter their interrogatories, they must examine upon the old interrogatories, which were exhibited at the former commission, \* and are not to add any new ones, without special leave of the court; and they are to be settled by a baron, and never allowed but in extraordinary cases.

And note, witnesses, who have been examined on the first commission, cannot be examined upon a second, to the same matter, without leave of the court. Bunbury's Rep. 24.

If the commissioners proceed to examine and adjourn, and one of the defendant's commissioners takes away the commission, yet the other commissioner may proceed, and the court

will grant a subpoena duces tecum to bring in the commission.

Tho' the place for executing the commission be fixed by the court, yet the commissioners may agree to adjourn to another place; for the appointment by the court is only for the opening of the commission, therefore, if the commissioners agree, they have yet power to make proper adjournments.

\* 608

Witnesses examined in town.

And note, altho' the place for executing the commission be fixed by the court, yet the commissioners may agree to adjourn to another place; for the appointment by the court is only for the opening of the commission, therefore, if the commissioners agree, they have yet power to make proper adjournments.

\* If the witnesses live in town, or within twelve miles thereof, and you have no occasion to go to a commission in the country, or after you have examined some witnesses in the country, you have others to examine in town, then you are to exhibit your interrogatories in the examiner's office, as before in page (576) but issue must be first joined, or rules given as aforesaid.

RULE.  
Proceedings on examining in  
Dublin.

By the 32d general rule, the attorneys are to take care that they give the attorney for the adverse party the names and dwelling places in writing of their witnesses, and before which of the barons they intend to examine them, four days at least before they proceed to their examination, to the end, that the adverse party may exhibit cross interrogatories to the said witnesses, if he think fit; but in case the party to be examined be in danger of death, upon affidavit thereof, shorter notice may

## Interrogatories, &c.

may serve. And if a witness be examined on one side, and afterwards he be served with a process to be examined on the other side, and refuse, the court will not allow his depositions to be used, because he hath shewn himself partial.

his depositions shall

If a witness  
examined on one  
side, refuses to  
be examined by  
the other party,  
not be used.

All witnesses or parties to be examined in *Dublin*, must be first sworn before one of the barons, to answer truly \* to the interrogatories; and their names who are sworn, must be indorsed by the examiner or his clerk upon the interrogatories.

Before the wit-  
nesses are ex-  
amined in Dub-  
lin, they are to  
be sworn, be-  
fore a baron.

\* 609

If interrogatories are filed for cross examination of a witness, the party who produces him is obliged, if the other party requires it, to procure him to stay or return to be examined; but if no such interrogatories are filed, or he is not demanded to be cross-examined at the same time when he is under examination, and if he goes away about his business, the party who intends to cross-examine him, must get him examined as well as he can, and the adverse party is not in that case bound to produce him over again to attend to be cross-examined, since it was the party's fault who would cross-examine the witness, that he had not the interrogatories ready whilst he was under his former examination.

The party who  
produces a wit-  
ness must pro-  
cure him to stay,  
or return to be  
cross-examined,  
if required, and  
the cross inter-  
rogatories pre-  
pared, but not  
otherwise.

If a party examines some witnesses in town and others by commission, he is not obliged to exhibit or file his whole set of interrogatories with the examiner, he may only file such as he hath occasion to examine to in town, but they must be the same as were exhibited before at the commission; if this were otherwise it would put the parties to a double expence of paying for \* copies of the whole interrogatories twice over.

If a party who  
has examined on  
a commission,  
shall also ex-  
amine in town,  
he need only  
lodge with the  
examiner such  
of the interro-  
gatories as he would examine to.

\* 610

If a witness misbehaves, or refuses to answer, the commissioners ought to certify it to the court, and they will order an attachment, and will oblige him to come up to be examined at his own cost before an examiner.

Misbehaviour of  
witnesses.

If any practicer or other person goes about to tamper with, or suborn any witness, upon complaint thereof, and upon examination and proof of the matter upon oath, he shall stand committed.

A witness cannot demur because the questions asked him are not pertinent to the matter in issue. *1 Vern. 165.*

A witness can-  
not demur, be-  
cause the ques-  
tions asked him are not pertinent.

Although the privilege of peerage doth allow a peer to put in his answer upon honour only, yet it is restrained to an answer upon honour, but his answer to interrogatories and examination as a witness must be on oath.

A peer of the  
realm is to put  
in his answer to

fwer;

## Interrogatories, &c.

fwer; and as to all affidavits, and where a peer is examined as a witness on interrogatories, or *viva voce*, he must be upon his oath. *Peer Williams* 147.

Such defendants only as to whom issue is joined, to be named in the commission and interrogatories.

\* 611

If there be several defendants in the cause, and that issue is not joined as to some of them, the best way is to name those defendants only as parties to the commission and interrogatories as to \* whom issue is joined, and to put the words (and others) after them; and the reason is, if a defendant should be misnamed, or the party omitted, who should have been in, or a party inserted as a defendant who has been struck out of the cause, or ought not to have been in, the examination will not be in the cause, in which it was intended.

The time allowed for filing the commission.

Four days are allowed after the return day mentioned in the commission, to file the commission and the depositions, and no further time will be granted, without special reason assigned to the court, by counsel, upon affidavit of the facts.

## Of Publication.

The proceedings on publication at the civil law.

THEY had anciently at the civil law as appears by the 90th *Novel Ch. 5. Coll. 7. Title 2d. De testibus quia vero*, three probatory terms, or *dilations*, according to the rule of the civil law. See *Lancel. Inst. of the canon law, 92. Gal 157, de Dilat. Maranta de Dilat. 305.*

Ibidem.

\* 612

*In testem testes, et in hos, sed non datur ultra;* in the first probatory term the plaintiff and defendant were to produce their first set of witnesses; in the \* second they were to bring witnesses to their credit, or to invalidate their testimony; and in the last probatory term they were to restore the credit of their first witnesses; and it was with great difficulty they granted a fourth probatory term, and that was on the solemn oath of the party moving for it, and declaring upon such oath, that he or his advocates had seen none of the depositions, nor knew what was contained in them; and over and above the oath of *juramentum caluniae*, swearing again that it was not done out of vexation, nor to protract the cause; (for it was highly presumptive without an oath that the desiring the fourth probatory term was to that purpose) but after the fourth dilation, there was to be

## Interrogatories, &c.

be no fifth probatory term even *jus sione divina*, that is to say, by the emperor's command. *Peers* 210. But the canonists have relaxed this notion of the three probatory terms, and have put all into one.

The next thing was the passing of the publication, and formerly the adverse party was cited to that purpose, but afterwards the use prevailed, to give a rule to the adverse party to shew cause in four days, why publication should not pass; and if he did not shew cause within that time, for prolonging the probatory term, then publication passed, and afterwards there could be no examination of witnesses, \* unless by special direction of the judge upon cause shewn, and an affidavit that he or those employed by him had not, nor would not see the depositions of the witnesses which were published, by reason of the manifest danger of perjury and subornation of witnesses, in case examination should be allowed after publication. *Marrant.* 350, 351. *Gail* 184: *de publicat.*

\* 613

But after publication there might be *editio instrumentorum* until the conclusion in the cause, because there was no danger of perjury upon the proof of such notorious instruments. *Ibidem.*

The judge was not concluded by the publication to examine either of the parties upon personal interrogatories, or to re-examine the witnesses themselves.

Thus in our courts of equity when the examinations are closed, the next act is the passing of publication, which properly speaking, is that power or liberty which is given by the court to the philizer, or the examiners, either upon motion, or by consent of parties, to shew the depositions openly, and to give out copies of them.

By the 45th general rule when witnesses are examined, the first rule for publication is to be moved of course without notice, and upon this motion, \* the court will grant a conditional order to shew cause in four days why publication should not be granted, and an attested copy of this order is to be served on the adverse attorney; and when the time for shewing cause is expired, the court, upon counsel's motion, and proper notice given thereof, and upon producing the last order, an affidavit of the service thereof, and a certificate from the chief remembrancer of no cause been shewn why publication should not pass, will make the rule for publication absolute.

RULE.  
Proceedings on obtaining publication.

\* 614

If the party who issues a commission to examine witnesses delays to file depositions, the adverse party (whether plaintiff or defendant) may put a rule upon the other party to return the commission, and file the depositions in a short day.

On delay in either party in filing the depositions, the other party may put a rule on him for that purpose.

And

## *Interrogatories, &c.*

When filed ~~ejus~~, And when the depositions are filed, either party, plaintiff, ther party may or defendant, may move for publication, but not before, or move for publication will be set aside as irregular, upon the order for publication will be set aside as irregular, upon certificate and motion, before.

If the commissioners or any other refuse or neglect to return the commission and depositions, the court will attach them. What the commissioners are entitled to for their trouble, &c.

\* 615

RULE 1673. Plaintiff forbearing one term to move for publication, defendant may do it next term, and proceed to a hearing.

The plaintiff forbearing to prosecute and move for publication one term, the next term following the defendant may move for publication, and proceed thereon to a hearing, *ex parte defendantis*.

## *In what Cases new or additional Interrogatories may be exhibited to Witnesses, and in what Cases they may be examined after publication.*

RULE.  
No new interrogatories to examine a witness already examined, nor is any witness to be examined after the order for publication is shewn to the examiner.

\* 616

And no re-examination without leave of the court, or con-

BY the 39th general rule, no new interrogatories are to be admitted to examine any witnesses, after the same witnesses have been once examined, upon interrogatories entered in court for the same party in the same cause; neither are any witnesses at any time (without order of court) to be examined in any cause, after the order for publication is passed, and a copy \* thereof sent or shewn to the examiner, altho' the witness be sworn before such order be delivered.

No re-examination of witnesses is allowed, though upon the same interrogatories, but on special circumstances, set forth by motion and affidavit; and if either party have a commission, *de novo*, after he hath examined on a former, he must examine on the same interrogatories, as were exhibited by him on the former commission, and no other interrogatories can

## Interrogatories, &c.

can be admitted without an order, or consent of parties. 2 Ch.

Ca. 217.

In the case of *Maxwell* against *Bond*, in *Chancery*, 27th of July 1743, Lord Chancellor said, the court would look into the interrogatories, and if the new interrogatory appeared to be proper, and not contained in the interrogatories already exhibited, he would allow the new interrogatory.

And on a supplemental bill, the court will, upon counsel's motion, give leave to add to the first interrogatories, so as the new interrogatories contain nothing but what relates to the supplemental matter.

On a supplemental bill, new interrogatories may be exhibited with leave of the court, relating to the supplemental matter only.

Although courts of equity will in no case, after publication passed, and the purport of the depositions known to \* the parties, give leave to examine any witness, who has been already examined in the cause, or any other witness, to any matter before examined to, from the danger of perjury; yet where either through mistake, omission, or ignorance, some material fact, in issue, in the cause, has not been examined to, and that this appears by affidavit, and that it does not appear, that the application is made, either from vexation, or for delay, and that there is no danger of perjury in the case, the court will on special application, by council, (upon notice for that purpose,) give leave to examine, even after publication has passed, upon additional interrogatories, to be settled by a baron. So determined in this court, upon solemn debate, *Trinity term* 1758, in the case of the Attorney General against *Carden* and others, on an *English* information, for a forfeited estate; and the court declared, they would have made the same rule, had it been between common persons, and the crown not concerned, it being for the benefit of all parties, for that if the cause had been brought to a hearing, the court would have directed an issue to have tried the facts omitted to be proved.

In what cases an examination may be after publication has passed.

\* 617

And in 2 *Vern.* 197. 249, it is said, that where the baron *Ibidem.* and feme exhibit a bill, for a demand, in right of the \* wife, the defendant's answer, and the cause being at issue, several witnesses are examined, and publication passes; but before it proceeds to a hearing, the husband dies, and the feme marries a second husband, and they bring a new bill for the same matter, the wife shall not be bound by the proceedings, in the former cause, and they may examine again the same witnesses, as were examined in the former cause.

\* 618

But if plaintiff dies after publication, his executors can- *Ibidem.* not exhibit a new bill, on the same matter, to make further proof.

And

*Interrogatories, &c.*

*Bidens.*

And where a bill was brought for a legacy, against baron and feine, who was executrix of the testator, the defendant answers, witnesses are examined, and publication passed; afterwards the husband dies, it was held by the court, that in this case there is no abatement, and the wife shall be bound by the answer and depositions; but it might be otherwise, if the wife's inheritance was in question. 2 Vern. 249.

Additional interrogatories, and the proceedings in obtaining leave to exhibit them.

\* 619

Each party may produce interrogatories, or further interrogatories, until the examination is opened; but where either party would exhibit an additional interrogatory, after the examination is begun, though it be before the order for publication is passed, there must first be an order obtained for that purpose, which the court will grant of course upon an attorney's motion; but if the order for publication be passed, then the motion is to be made by counsel, for liberty to exhibit the additional interrogatory, on an affidavit of the person who makes the application, that he hath not directly, or indirectly, come to the knowledge of what has been sworn by the witnesses, who have been examined; and notice of the motion must be given to the opposite party, and if the court grants the motion, it is referred to a baron, to settle the interrogatory; and if copies of the depositions be not given out, the court will respite publication.

To be settled by  
a baron on re-  
ference to him.

A witness may  
on special cir-  
cumstances be  
examined after  
publication.

Though the rule be, that after publication, no new witness can be examined, nor a witness before examined, re-examined, yet on special circumstances, set forth by motion and affidavit, and that the party applying, his agent, or solicitor, hath not seen, heard, read, or been informed, of any of the contents of the depositions in the cause, and will not see, &c. the rule may be dispensed with. 1 Ch. Ca. 228. 2 Ch. Ca. 75.

But the other  
party shall be at  
liberty to ex-  
amine at large,  
as well as cross-  
examine.

\* 620

Upon motion for leave to examine after publication, upon making the \* usual oath, of not having seen the depositions, the Lord Keeper declared, That in such a case, the other side should be at liberty to examine at large, as well as cross-examine, the witnesses produced by the party that made the motion, (which was all he might do formerly) and his reason was, that a crafty solicitor may lie on the lurch, and examine nothing till after publication is past, and the other party may think himself secure, and so not examine to those points, which he could otherwise have proved, in regard he finds his adversary has not examined to these matters; and when one publication is passed, and the party that examined, has seen his own depositions, then the side that lay still (having tied up his adversary, so that he can only cross-examine the other witnesses) applies for an order upon the usual affidavit, to enlarge publication, and when he has got that order, then he comes in with a whole cloud of witnesses: And though it might be thought hard, that any one should have liberty to examine after

## Interrogatories, &c.

sier he has seen the depositions, yet his lordship thought it a reasonable penalty, on such as would not examine in time; or that should lie on the catch, to take advantage of the other party; and ordered the register to take notice of it, as a fixed rule for the future. *Mich. 1684.* 1 *Vern.* 253.

\* But matters in issue, in the original cause, and publication passed, or settled by the decree, cannot be examined to, in the cross-cause. *Moseley's Rep.* 282. *Curs. Canc.* 323, 324, 327. 1 *Ch. Ca.* 25. 155. 233. 234. 2 *Ch. Ca.* 75. 79. 217. 1 *Vern.* 253. 2 *Vern.* 409.

\* 621

Matters examined to in the original cause, and publication passed, or settled by the decree, cannot be examined to in the cross-cause.

Interrogatories and the depositions of a witness taken on them, had been suppressed, for that the interrogatories were leading, and then publication passed, and the court was moved that a new set of interrogatories might be drawn and settled by the master, for the examination of this witness whose evidence was very material, and yet must be wholly lost unless the court would indulge them this way: And though the practice was admitted to be always against it, and it was urged, to be of dangerous consequence, yet one precedent being produced to this purpose, and the interrogatories which had been suppressed, being such as might be drawn by many other counsel, without any apprehension of their being leading; the court, to let in the party to the benefit of his witness's testimony, ordered interrogatories to be put in, to be first settled by a master, for his examination over again. *Trin. 1718,* between *Spence* and *Allen.* *Bac. Equ. Ca.* 232.

After deposition suppressed, the witness examined again on a new set of interrogatories, settled by a master.

\* In *Bacon's Equ. Ca.* pa. 233, it is said, that in the case of *Andrews and Brown, Paesch.* 1714, it was agreed by the court and bar, that if interrogatories are exhibited in the examiner's office, and witnesses examined thereon, either party may without application to the court, or order for that purpose, exhibit one or more interrogatories, or a new set of interrogatories, or further examination of the same, or other witnesses: But when a commission is taken out there; no new interrogatories, or set of interrogatories, can be exhibited without motion, and order of the court: And the reason of the difference is, because the examiner is an officer of credit, and sworn, and therefore presumed to be impartial, and that he will not disclose the depositions; besides, as has been said before, the examination by him, is presumed to be the examination of the judge: Whereas commissioners are private persons, and therefore, without leave of the court, no new interrogatories can be added before them. *Sed quær.* if this must not be before any order for publication hath been sent, or shewn to the examiner. *Vide antea,* pa. 616. 618.

\* 622

New interrogatories may be exhibited when the examination is by an examiner, but not when it is by commission, and the reason.

Although

## Interrogatories, &c.

Interrogatories  
may be exhibi-  
ted after hearing,  
in aid of an ac-  
count.

\* 623

No examining  
of witnesses, on  
a bill brought to  
have the benefit  
of a former de-  
cree.

Although by the orders of the court, the parties are to make their full proof before publication and hearing of the \* cause; yet after hearing, if there be a reference to the officer, for the stating an account, or such like matter, the parties, or either of them, may examine witnesses, in aid thereof.

In a bill brought to have the benefit of a former decree, the plaintiff cannot examine witnesses, much less the same witnesses, to the matters in issue, in a former cause. But on such a bill, the court may examine the justice of the former decree; but then it must be upon the proofs taken in the cause, whereina that decree is made, and not upon any new proofs. 2 V. 409.

Witnesses ex-  
amined de bene  
esse, and the  
proceedings.

\* 624

**E**XAMINATION *de bene esse*, is used on other bills, than barely to perpetuate testimony; for after a bill filed in any cause, if it shall happen, that there is a material witness for either plaintiff, or defendant, who is aged, or infirm, sick, or going beyond seas, so that the party is in danger of losing his testimony, the court, upon affidavit of these circumstances, and on \* motion of counsel thereon, will order him to be examined, *de bene esse*.

Ibidem.

And in this affidavit, the christian and surnames, place of abode, addition, or occupation of the witnesses must be set forth; for otherwise, the opposite party has no opportunity of contradicting the affidavit; nor can the person who makes it, be indicted for perjury, though he shall have sworn falsely.

The depositions  
thereon, only to  
affect the parties  
in the cause, or  
persons deriving  
under the same  
title.

Defendant may  
join in commis-  
sion, and cross-  
examine.

The depositions on this examination shall affect those only to who are parties to the suit, or who derive under the same title; but if it appear that the witnesses might have been afterwards examined in chief, regularly such depositions shall not be made use of. 1 Williams, 568, 569.

If the defendant be not in court, when this application is made by the plaintiff, he may come in by appearance, and join

\* Of this motion, notice is sometimes required, and often not, according to the circumstances of the case; it is not necessary, where a defendant is in contempt, so that the plaintiff could not join issue, but where the defendant is in court, and hath given no delay, it is said that notice ought to be given. Also, generally, where the application is on behalf of the defendant.

*Interrogatories, &c.*

join in commission, and cross-examine the plaintiff's witnesses.  
2. Har. Ch. Pract. 41.

\* So may the plaintiff also cross-examine the defendant's witnesses on such an examination, on behalf of the defendant.

\* 625

So may the plaintiff.

A witness may be examined *de bene esse*, though neither old, infirm or going abroad, according to the circumstances of the case; as where a person is the only witness, who has any knowledge of the forgery of a deed, or other material fact; for otherwise, if he dies before he is examined in chief, the proof of the fact is gone. *Curs. Canc.* 275. 294. 300. *Pract.* Reg. in Chanc. 166. *Moseley's Rep.* 390.

A person may be examined de bene esse, though neither old, infirm, or going abroad.

But note, after the defendant hath answered, the court will not, unless on some extraordinary circumstances, give the plaintiff leave to examine, *de bene esse*, as he may immediately reply, and examine the witnesses, in the usual manner.

After answer  
the court seldom  
give the plain-  
tiff leave to ex-  
amine de bene  
esse.

A cause having been heard, and referred to an account, the plaintiff afterwards moved to examine two of the defendants *de bene esse*, which was ordered unless cause was shewn; and the defendants counsel in shewing cause, took this difference, viz. that although it was an order of course, to examine a defendant, *de bene esse*, saving just \* exceptions; yet when the cause was open, and it appeared that the defendants were parties interested, it was proper to shew it as cause against such an order before the witnesses were examined; which difference was allowed of: But it appearing in this case, that the defendants had given releases of their right, the cause was disallowed. *Patch.* 1687, between *Glover* and *Faulkner*. 1. Vern.

A defendant  
may be examin-  
ed de bene esse;  
but if he be in-  
terested, it may  
be shewn as  
cause against his  
being examined.

\* 626

452.

If the depositions, *de bene esse*, are to be published, or any ways made use of against a witness so examined *de bene esse*, such witness ought to have a copy of the depositions before he is examined in chief; to the intent that he may have due cautionary means allowed him to prevent his contradicting himself; and this is always done. 1 *Williams*, 569. *Cam* against *Cam*.

These deposi-  
tions if published  
or made use of  
against a witness  
examined de  
bene esse, the  
witness should  
have a copy of  
them, before he  
is examined in  
chief.

If contradictory,  
yet not perjury  
at law.

And in this case, lord chancellor *Parker* declared, that many questions might arise, if it should happen that the depositions *de bene esse*, were quite contradictory to the depositions in chief; but his lordship said, he did not think it could be perjury at

Vox. II.

F

law,

## Interrogatories, &c.

\* 627

law \*, there being \* no issue joined, as there must be before the depositions are taken in chief.

A plaintiff not to be examined, *bene esse*, though a defendant may.

Depositions of witnesses examined *de bene esse*, ordered to be read on a trial at law.

The court cannot make an order to examine a plaintiff *de bene esse*, saving just exceptions, though they will make such order to examine a defendant; but the defendant ought to have demurred to such immaterial plaintiff. 1 Williams, 595.

The plaintiff examined his witnesses, *de bene esse*, in Michael's vacation, and in Hilary term following, the defendant put in his answer; and five weeks afterwards, before any replication filed, or examination in chief, the witnesses died; and it was moved that this deposition might be read; and it was likewise prayed that it might be made use of at law, (although by the strict rules of the common law, no depositions of witnesses taken *de bene esse*, or before issue joined, can be read or given in evidence) and that the defendant might be ordered not to oppose the reading of it at the trial there, which my Lord Keeper held reasonable, for that otherwise an examination, *de bene esse*, would be to no purpose. 1 Vern. 331.

The proceedings to publish the depositions *de bene esse*, if the witness dies, before he could be examined in chief.

\* 628

If the witness lives till he can be examined in chief, he must be examined over again, as other witnesses in chief are; but if he dies in the mean time, \* then the party, for whose benefit he was examined, may (proper notice being first given to the opposite attorney) apply by his counsel for liberty to publish the depositions, and if the death of the witness be sufficiently proved, and if it appears that he died before the time he could be examined in chief, the court will thereupon make an order, not only to publish his depositions, but to read him as a witness at the hearing, saving exceptions.

Or before he return from abroad.

If the witness beyond sea, be not returned, there must be an affidavit of it; and that the party hath not heard from him of such a time, and that he doth not know whether he be living or dead; and in this case there will be the like order, as in the case of the witness who died before he could be examined in chief. 2 Bacon, 305.

On bills taken as confessed, plaintiff may examine *de bene esse*.

For the method of examining witnesses *de bene esse*, on bills taken as confessed, in causes heard upon sequestrations, and the proceedings thereon, pursuant to the statute, 7 Geo. 2. Ch. 14, see the proceedings on such hearings, under *Title Hearing*.

Letter

\* Cro. Cha. 332. 3 Inst. 167. And yet it seems that if such depositions *de bene esse*, upon a bill to perpetuate the testimony of witnesses, where there is no issue joined, on the death of the witness, may be read in evidence. Cartb. 265.

A LETTER MISSIVE is an epistle directed from the court to the defendant, being a peer, or a privy counsellor, requiring him to retain an attorney of the court to appear for him at a certain day therein limited. And it is made returnable, either on one of the return days in term, or at a certain day in term, or in the four days after *Easter* term, or in the eight days after any other term; and it is to be dated in term, or in the four or eight days after term, and to be signed by two of the barons at least, of which the chief baron (if he be in town) to be one \*.

Letter missive,  
what, and how  
to be tested, and  
returned, and  
prepared.

By the 3d general rule, *subpœnas* upon letter missive are to issue of course, affidavit of the service of the letter \* missive, being first made and filed in the office †.

RULE.  
Subpœna if no  
appearance on  
the letter mis-  
sive.

F 2

This

\* 630

\* When the practice was introduced of sending a letter to a peer instead of a *subpœna, non confat*; Mr. Selden lays, 6 vol. 1543, that it was the course in the Star Chamber of Chancery, to pray such a letter in a bill against a peer; possibly that practice being begun in the Star Chamber, on the erection of that court, towards the end of Henry the eighth's reign, might be afterwards followed in courts of equity. No mention of any process but a *subpœna* is made in the year books, or *Doctor and Student*; but in the *West Symb.* S. 21, it is taken notice of as the course in Chancery. 36 Eliz. See *Comyns*, 675.

† It has been practised, these many years, to issue letters missive, and the *subpœnas* at the same time, only the *subpœna* is made returnable at a day after the return of the letter missive; but this alteration seems somewhat extraordinary, for the letter missive was founded on a respect which is thought due to the peerage engaged in publick affairs, and who are ever supposed to be more attentive to the summons of justice than men of lower degree, that they should have notice before the ordinary process issued against them; and it is so expressed in the letter missive; which is not the case, if they are served with a *subpœna* at the same time that the letter missive is delivered to them; and yet it is agreeable to the practice in Chancery.

And in the case of the administrator of *Newenham*, against the earl of *Wandesford*, Trinity term 1759, it was determined, on full consideration of the court, that notwithstanding the old rule was, that the *subpœna* was to be first served, and that upon affidavit thereof, the letter missive only could issue; yet as the practice for many years has been otherwise, and as the inconveniences might be extremely great from the delay, especially in cases of injunctions to stop proceedings at law, where, if the peer should be at a great distance from *Dublin*, or should not pay the due regard to the compliment, or even from the delay which must be of course, if the rule be pursued, a man may unjustly be deprived of his liberty for a whole long vacation; and this for the sake of precipitancy, or a rigid

## *Letter Missive.*

\* 631

This letter a compliment.

RULE.

The time defendant has to appear and answer.

How the letter is to be delivered.

\* This letter is but a \* compliment, and not process to found proceedings upon; and the peer may appear, or not appear at the return thereof, as he pleases; for, by the 4th general rule, he has four days after the return of the *subpoena* to appear, and four days more to answer before any compulsory proceedings can be had against him. And note, the letter itself is to be delivered to the peer, but it will be proper to keep a copy thereof, in order to draw an affidavit of service thereon, if it should be necessary.

A copy of the bill to be also served on the peer, and how to proceed, if the peer does not appear, &c.

\* 632

The peer is also to be served with an attested copy of the bill, and if the defendant doth not appear within the time before mentioned, then, upon certificate thereof, and of the time the bill was filed, and upon an affidavit of the service of the letter missive and *subpoena*, and of having delivered an attested copy of the bill to the defendant, the plaintiff's counsel may move that \* a † sequestration may issue against the defendant being a peer, if he does not appear and answer, by the time that process to a sequestration might issue against a person not intitled to privilege, and the court will make an order for that purpose; and this order is to be served on the defendant; and if he still neglects to appear, the process shall issue pursuant to the order.

Or if he appears, and neglects to answer.

So likewise, if the defendant appears, but afterwards neglects to answer in time, the court, upon motion of counsel for the plaintiff, will make the same order, upon producing a certificate of the appearance, and that no answer is filed. For the further proceedings, see *Title Privileged Persons and Bills taken pro Confesso.*

The

rigid nicety in a mere matter of compliment; the court therefore, thought it more for the publick convenience (far worthier of consideration) to negl&t the rule, and adhere to the practice, and especially as the officers of the court, and several old practitioners declared it had been so these thirty years: It is true, in the law side of this court, the proceedings are agreeable to the old rule here, but the same inconveniences cannot attend it there; and so it is in the Chancery in England. See *Har. Chan. Pract.* 51.

\* The citation at the canon law was two-fold, *verbalis*, which was not in writing, or *per muncium*, but if the deponent was *personus illustris, notarissima*, the citation was to be in writing, as it was the most respectful manner of application.

† Heretofore on the default of the defendant, being a peer, in appearing, or answering, it was usual, according to the 4th general rule, to move for a fine; and when a second fine was imposed, to have an attachment upon motion, and after that, all the other process of contempt to issue of course; but this method of proceeding has been disused for some time, and the present practice substituted.

## *Letter Missive.*

The persons intitled to letters missive, are peers of the realm, and privy counsellors, so are dutchesses, countesses and baronesses, though they marry under degree of nobility; but if the woman obtains nobility by the \* marriage of a duke, &c. and after his death marry under degree of nobility, she loseth the dignity of her first marriage, and is not to be served with a letter missive. See *Co. Lit. Sect. 9. Pa. 16. E. F. 6 Co. Rep. 53.* See my Practice of the *Law Side of the Exchequer*, vol. 1. pa. 15, &c. and 85, &c.

\* 633

In the *Chancery in England*, if a peer after being served, fails to appear upon affidavit of service, and certificate of no appearance, the court, on motion, grant a sequestration, unless cause in eight days after personal service; and if no cause is then shewn, the sequestration is made absolute. See *Har. Ch. Pract. Vol. 1. 317.* And it is said, that it is necessary to take out an attachment to ground a sequestration upon, though it is not to be executed.

Letters missive,  
the proceedings  
thereon in the  
Chancery in  
England.

But note, if a woman, who was a peeress by marriage, but hath lost her privilege by marrying a commoner, shall be served with process as a common person, and shall neglect or refuse to appear thereto, in such manner as she was intitled in the process, the plaintiff shall not enter an attachment against her without leave of the court, upon a special motion for that purpose. See the case of *Gash against Cash. Pierce*, commonly called lady *Barrymore* in this court, 22d June, 1730.

No attachment  
against a wo-  
man who was a  
peeress, but lost  
her privilege by  
marrying a  
commoner  
without leava  
of the court.

\* This may be a proper compliment before the party is in court, but when he has appeared and answered, and a decree is against him, it seems most proper to demand obedience to it by process of the crown, than by letter from the barons. *Cowyns, 676.* See Title *Privileged Persons.*

\* 634  
Decree served  
on peer needs  
no letter mis-  
sive.

*What*

## *What Rights, Actions, or Demands, are deemed in, or out of the Statute of Limitations in Equity.*

What suits are limited by the statute, and what not.

Rights saved,

\* 635  
A province that plaintiff may commence a new action within a year after judgment is reversed, a verdict set aside, or an outlawry reversed.

Plaintiff's right saved, when the defendant is beyond sea.

Debt on specialties, judgments, &c.

Mortgagees twenty years in possession.

Limitation of suits for recovery of lands, or incumbrances thereon.

\* 636

Rights saved.

BY the 10th Cha. 1st. Sess. 2d. Ch. 6, all actions upon the case, other than for slander, actions of account (other than what concern merchandise, between merchant and merchant) actions of trespass, *quare clausum frigat*, debt upon lending or contract, without specialty, for arrearages of rent, for detinue, trover, replevin, shall be commenced within six years after the cause of action, and not after. But the right of *infants*, *some coverts*, *non campus mentis*, persons imprisoned, or beyond sea, is saved; so that they commence their suits within the time above limited, after their imperfections removed; provided, that if in any such actions, judgment is given for the plaintiff, and the same is reversed for error; or if a verdict passes for him, and upon motion in arrest of judgment, it is given against him; or if the defendant is outlawed in the suit, and does after reverse the outlawry; in these cases the plaintiff, his heirs, &c. may commence a new action within a year, and not after.

And by 6 Ann. Ch. 10, the plaintiff's right is as much saved, when the defendant is beyond sea, as if he were so himself; provided he brings his action within such time after his return, as is limited by the aforesaid Statute. 10 Cha. 1st. Ch. 6.

And by 8 Geo. 1st. Ch. 4, in actions of debt on specialties, judgments, statutes, &c. due twenty years, and no action commenced in that time for the same, nor no interest, &c. paid, the defendant may plead payment in bar.

And mortgagees twenty years in possession, may plead it in bar to any action, by the person intitled to the equity of redemption.

And, by the said Statute, all persons not already barred, claiming any estate, &c. or incumbrance on any lands, &c. not being in possession for twenty years \* by themselves, or those under whom they claim, and not commencing an action for the same before the 12th of September, 1726, are for ever barred.

But in this act there is a saving for persons who shall commence an action in five years after the title accruing.

And

*Limitations, &c.*

And the right of infants, *feme covert*, *non compos mentis*, per. Ibidem. sons imprisoned and beyond sea, and their legal representatives is saved, so that they commenced their suits within the time above limited, after their imperfections are removed.

An infant who neglects to enter six years after he comes of age, is as much barred by the statute of limitations from bringing a bill for an account of profits, as he is from an action of account at common law. *Preced. in Chanc.* 518.

Infant bar'd  
from an account  
of profits, by  
not entering six  
years after he  
comes of age.

A legacy is not within the statute of limitations, and there is this difference between debts and legacies, as to their antiquity, legacies always appear upon the face of the will; and so an executor knows what he ought to pay, without being asked or told: But for debts, and other dormant demands, against which he cannot provide without notice, there the statute had reason to limit the time. *1 Vern. 256. Sed vide \* 2 Vern. 21*, where, after a great length of time, a legacy shall be presumed to be paid.

\* 637

And no length of time will bar a fraud in equity, and a plaintiff, after six years, is intitled to a discovery of a fraud; to the statute at law, and in equity. *Talbot's Rep. 63. Moseley's Rep. 18. 245.*

*Nels. fol. Rep. in Canc. 14. 266.*

A trust is not within the statute of limitations. *Bac. Equ. Ca. 303. 2 Williams Rep. 145. 374.*

A trust not  
within the sta-  
tute.

The plaintiff exhibited a bill to have an account of money received by the defendant from his father, (whose executor he was,) who gave it to compound for his estate, sequestered for delinquency at *Goldsmiths-Hall*; and it was ordered accordingly, the court declaring it a trust, and therefore not within the statute of limitations. *Mich. 15. Cha. 2. between Sheldon and Weldman, 1 Ch. Ca. 26.*

So, where lady *Hollis* lent 100l. and in the note, which was given for it, mention was made that it should be disposed of as she should direct; and a bill being exhibited for it, the court held it a *depositum* or trust, and decreed payment of it, tho' otherwise it was barred \* by the statute of limitation. *2 Vent. 345.*

\* 638

The plaintiff, who was son and executor of chief justice *Heath*, who was made chief justice at *Oxon*, during the difference between the king and parliament (but never sat in *Westminster-Hall*) exhibited a bill against the defendants prothonotaries of the *K. B.* at that time, to have an account of the money, &c. received by them at that time *virtute officii*; to which the defendants pleaded the statute of limitations; but, upon

Not an implied  
trust.

## Limitations, &c.

upon argument, the plea was over-ruled. 15 Ch. 2d. between Sir Edward Heath and Henley, and others. 1 Ch. Ca. 20. 3. Ch. Rep. 8. 8. C.

**Nor a charity.** A charity is not within the statute of limitations. 1 Vern. 256.

**Nor accounts current or open,**  
but stated ac-  
counts are.

The statute of limitations is no plea in bar to an open or current account. Pach. 1687, between Scudmore and White, 1 Vern. 456. But accounts stated between merchant and mer-  
chant, are barred by the statute 89, 90. 2 Saund. 124.

If a bill in equi-  
ty abates by  
death, executor  
or administrator  
must revive in  
six years, or he  
is barred by  
the statute, but  
not after a decree to an account.

Where a bill in equity abates by death, if the executor or administrator will not revive within six years, it is within the statute of limitations; but if there be a decree to an account, and the suit afterwards abates by death, \* and the executor does not revive within six years, this is not within the statute. 1 Williams 742.

\* 639

Where the time begins against a creditor in the life time of the ancestor, or testator, it goes to the executor or heir.

The statute of limitations extends to attorney's bills.

Where there is no latches in the plaintiff, the statute of limitations shall not prejudice.

If a suit pending in equity will prevent the statute of limitations from being pleaded at law.

In the case of *Vaughan* against *Guy, Moseley's Rep.* 245, it was said, that it was resolved by the master of the rolls, and af-  
firmed on an appeal to lord *Macclesfield*, that where the time begins to run against a creditor in the life time of the an-  
cestor, or testator, it goes on as to his executor or heir.

And in the same case it was said, that it has been resolved that the statute of limitations will extend to attorney's bills, though they are things done of record.

If there is no executor against whom the plaintiff may bring his action, he shall not be prejudiced by the statute of limitations, nor shall any latches in such case be imputed to him.

If a man sues in *Chancery*, and, pending the suit there, the statute of limitations attaches on his demand, and his bill is afterwards dismissed, the matter being properly determinable at common law; in such case the court will preserve the plain-  
tiff's right and will not suffer the statute to be pleaded in bar to his demand. 1 Vern. 73. *Sed vide* 2 Ch. Ca. 217. *E contra*, where it is said, if \* a suit be in *Chancery* for a debt for rent, by lease, parol, or simple contract, and beginneth within time of limitation, and is dismissed after the time of limitation, the court will not order the defendant to take an advantage of the statute of limitations: But if in such case, the party be stayed by act of the court, as by injunction, &c. it is other-  
wise; for the act of the court shall do no prejudice, as in the case of demurrers at common law.

\* 640

When

## Limitations, &c.

Where a defendant insists on the benefit of the Statute of Limitations by way of answer, he shall at the hearing, have the like benefit as if he had pleaded it. 2 Williams, 145.

The benefit of this statute insisted on by way of answer, shall avail the defendant at the hearing as if pleaded.

## Where Rights, Actions, or Demands, once barred by the Statute of Limitations, may be revived and set up again.

If a man has a debt due to him by note, or book debt, and has made no demand of it for six years, so that he is barr'd by the Statute of Limitations; yet if the debtor after the six years, puts out an advertisement in the Gazette, or any other News-paper, that all persons who have any debts owing to them from him may apply to such a place, and that they shall be paid; this \* (tho' general and may be intended of legal sufficient debts only) yet amounts to such an acknowledgment of that debt which was barred, as will revive the right and bring it out of the Statute again. *Prested. in Chanc. 385. Quær. if in the advertisement it had been said lawful debts.*

A debtor who publishes an advertisement in a News-paper that all debts due from him shall be paid, by this a debt barred by Statute shall be paid.

\* 641

So if in that case, the debtor had made his will and thereby directed, that all his debts should be paid, or made any provision for his debts in general; this likewise would revive such a debt, and bring it out of the Statute, so that his executors would be liable to the payment of that debt amongst the rest. *Ibidem. Sed Quær. vid. Moseley's Rep. 245,* where the testator made his will, (*inter al.*) in these words, "All the rest and residue of my estate, after payment of my debts and funeral expences, I give to my executors, &c." and on the Statute being pleaded to a bill filed by a creditor in this case, it was said that these words in a will, are no more than words of course, and what the law says. Where the lands are indeed devised to executors in trust to pay debts, the testator creates a new fund, and the nature of the debts are altered, and they are to be paid equally. 2 Vern. 141. *Gofston against Mill;* and great inconveniences would follow if this will should revive the debts, or \* prevent the executors from paying other creditors, and enable them to pay debts, that to pay otherwise would be a *devastavit*; but where lands are devised, no creditor can complain because a new fund is created. *Sed vide post.*

If one by will directs that his debts shall be paid, or makes a general provision for the payment, he thereby revives a debt barred by the Statute, and makes his executors liable.

\* 642

So, if after the six years the debtor, upon application for that particular debt, acknowledges and promises payment (for pay a debt which is barred by the Statute, sufficient to maintain an assumpſit; but a bare acknowledgement not, a bare

## Limitations, &c.

a bare acknowledgment has been ruled not sufficient) this revives the debt, and brings it out of the statute; because as the note itself was at first but an evidence of the debt, so that being barred, this acknowledgment and promise is a new evidence of the debt, and being proved, will maintain an *affumption* for recovery of it; and it was agreed that a little matter would bring a debt out of the statute, being to restore a right. *Preced. in Ch.* 386, between *Andrews* and *Brown*.

If lands devised  
in trust to pay  
debts, or sub-  
jected by will  
or deed to the  
payment of  
debts, will re-  
vive a debt bar-  
red by the sta-  
tute.

\* 643

If a man owing a debt by simple contract, barred by the statute of limitations, devises lands in trust to pay his debts; this tho' barred by the statute, is revived by his will. *2 Williams*, 373. And if a man by will or deed, subject his lands to the payment of his debts, debts barred by the statute of limitations shall be paid; for they are debts in equity, and the duty remains; the statute hath not \* extinguished that tho' it hath taken away the remedy. *1 Salk.* 154. 278. *2 Vern.* 141. *Sed vide Moseley's Rep.* 391. The case of *Legastick against Cowper*, *Trin.* 1730, where the testator devised his lands to two executors equally to be divided between them, willing them to pay his debts; and to a bill brought by a creditor, the executors pleaded the statute of limitations; and in this case lord chancellor King said he knew lord *Cowper* was of opinion, that where lands were devised in trust for the payment of debts, debts barred by the statute should be paid; but that to his knowledge the lords were of another opinion in the case of the earl of *Stafford*. And his lordship said he knew no power a court of equity has to controul an act of parliament; and if lands are given to executors for payment of debts, they are as much legal assets as the personal estate; and that he would not under the notion of a trust subvert the statute, and that the debt had been due to the plaintiff since 1707; and his lordship allowed the plea.

Equity will not  
compel execu-  
tors to plead the  
statute of limi-  
tations in bar to  
creditors, in fa-  
vour of a per-  
son who is to  
have the residue  
of the testator's  
effects.

\* 644

If a man devise all the rest and residue of his personal estate after debts and legacies paid to *J. S.* and several of the creditors are barred by the statute of limitations, who notwithstanding bring actions against the executor, and he refuses to plead the statute, yet \* equity will not, in favour of *J. S.* to whom the surplus is devised, compel the executor to plead the statute. *Mich.* 1699, between lord *Castleton* and lord *Faw-*  
*shaw* adjudged *Bac. Eq. Ca.* 305.

Motions

## Motions and Notices.

A MOTION is the request of either party, made *ore tenus* Motion what, to the court, by his counsel, or attorney; it is a petition, or reduced into writing. *Moseley's Rep.* 179.

By the 51st general rule, counsellors and attorneys are to make motions proper for themselves, and after a cause is settled, (hearing counsel on both sides) no new motion is to be made to cross it; except it be upon new matter, and unless they be sure the matter so alledged be weighty, and will be well proved.

RULE.  
Counsellors and attorneys to make motions proper for themselves, and no new motion, to be made when a cause is settled, unless it can be well supported.

And by the said rule, when any motion is made, the last order is always to be produced; and any order obtained, without producing the last order, to be void; and the cost occasioned by the neglect, to be paid to the party grieved.

\* And by the said rule, all affidavits, certificates and reports, are to be entered, at least the day before the motion be made thereon.

\* 645  
Affidavits, orders, and certificates to be entered the day before any motion be thereon.

For the different kinds of motions, and in what cases notice is necessary, and where not, see my *Practice of the Law Side of Exchequer*, Vol. 2. 178, &c.

The different kinds of motions, and where notice is necessary.

In general, where notice is necessary, the motion must be made by counsel; and in some cases, counsel are to move where notice is not requisite, as upon petitions for re-hearing, injunctions upon attachments, injunctions to the party, or attachments for contempt, against the honour or dignity of the court; and for writs of *duces tecum*, to bring deeds or writings to court.

Where notice is necessary, the motion is to be made by counsel, and in some cases where notice is not necessary, counsel must move.

But where notice is not necessary, as in motions of course, in ordinary cases, attorneys are admitted to move them: most of the motions made by attorneys, are such as ought to be entered of course in the office.

A motion of course, although notice be given of it, and though it be grounded on affidavits, cannot be opposed; for course cannot be opposed, though grounded on affidavits, and the notice be given.

When \* 646

## Motions and Notices.

Notice how to be drawn and served.

When notice is to be given, it is to be in writing, signed by the attorney; and it must be served upon the adverse party, or (which is most usual) on his attorney, and it is to be served two days before the motion is made, that is to say, must be an intervening day, before the motion is made; as the motion is to be made on Thursday, the notice must be given at least on Tuesday; but it is not good to serve a notice on Saturday, (but on Friday) to move on Monday, Sunday not being reckoned a day, in such cases.

Notice not good, unless it be in writing.

In the case of *Bell* against *Lecky* and others, in this court, Trinity term 1738, it was determined, that by the rule of the court, no notice is good, unless it be in writing.

And to be served before nine o'clock at night.

And every notice is regularly to be served before nine o'clock at night, that the attorney may have time to send early notice thereof to his client, to enable him to prepare for his defence; and if a notice be served after that hour, it is never looked upon by the court, as good notice, or service, if insisted on by the party served therewith.

\* 647  
Notice to receive money out of court, to be served personally.

\* This rule of serving notices of motions, generally is good in all cases; but as there is no general rule, but an exception lies to it, so there doth in this; for where there is a motion for money to be paid out of court, the notice must be served personally, on the adverse party, unless the defendant be out of the kingdom, or if it be difficult to find him; in which and such like cases, upon affidavit thereof, and upon motion thereon, the court will order the service of the party's house or place of abode, or his attorney in court, to be a sufficient service.

Notices what to contain.

All notices must contain every thing the party intends to move for, for the court will not ordinarily extend the rule beyond the notice; and it is also to express, and specify, upon what foundation the motion is to be grounded, with the day on which it is to be made; and is to bear date, the day on which it is to be served.

No affidavit to be read on a motion, unless mentioned in the notice.

In the case of *Archdall* against *Morrison*, in this court, term 1752, it was mentioned, in the notice of a motion, that the motion would be grounded on the pleadings and proceedings in the cause, and other reasons to be offered; on the motion, the counsel for the party who gave the notice offered to read an affidavit, which had \* been read upon a former motion, in the same cause, but it was objected to by the other side, for that no affidavit was mentioned in the present motion, and that an affidavit did not come under the word *proceeding*, and it was so determined by the court.

\* 648  
Affidavit not deemed a proceeding in a cause.

## Motions and Notices.

Motions may stand over to be heard on any other day, where the court thinks fit, but if notice be given, and not moved on for two or three motion days after, the party must give new notice, or move to save his notice, though the other party do not discharge it. And if a notice of a motion be given twice or thrice, and not moved, the counsel for the adverse party, upon producing the former notices may pray the court, that the party may pay the costs of the former notices, before he moves on the last notice, which the court generally orders: And if it be a matter of weight, and many counsel'd, the court will order costs to be taxed by the officer. See *Bunbury's Rep.* 86.

Notices of motions in what cases they shall be discharged, and cost paid.

And note, in general where a notice is discharged, for not being moved on, the opposite party is intitled to cost, whether be, or be not mentioned in the order.

Costs generally to be paid on discharging notices.

\* And in all cases, where costs are to be paid on ordinary motions, the court will award an attachment for the same, course.

\* 649

Attachment for costs, on ordinary motions of course

In the case of *Guthery and others, against Catchcart*, in this court, Mich. term 1753, a bill was filed the January before, for an injunction to stop proceedings at law, after judgment of refection, and on coming in of the answer, the plaintiff served a notice to move for an injunction on equity confessed, and obtained an order for an injunction; but after the notice was served, and before the motion was made, the defendant in equity, who was plaintiff at law, issued an *habere facias posse simem*, and took possession of the lands thereon; but upon application to the court, the possession was ordered to be restored, and that the attorney for the plaintiff at law, should be attached; but this last part of the order was remitted, the plaintiff's counsel not insisting on it, and he was ordered to pay the costs. And the court declared, that in all cases where party served with notice proceeds, pending the notice, the proceedings are at his peril.

By a rule made in this court, the 13th of December 1756, ordered, That all notices of motions hereafter to be \* made, to set aside any process, orders, decrees, or other proceedings for irregularity, do contain therein the irregularity to be complained of.

RULE.

Notices of motions to set aside process, &c. for irregularity, to express the irregularity.

\* 650

Where there is an original and amended bill, and new parties, and either party would be relieved, against any order in the original cause, the notice must be in the amended cause, or the first bill is by the amendment, out of the question. So determined in this court, in the case of *Rolls against Nagle*, 5th of February, 1757.

cause, the notice is to be in that cause.

Formerly

## *Ne exeat Regnum.*

Third years interest sworn due on a mortgage, the court will order the rents into court to be paid to the plaintiff.

Formerly where two years interest was sworn to be due on any mortgage, the court, on motion of counsel, on notice given, ordered the rents of the mortgaged premises, to be brought into court, to be paid to the plaintiff, in discharge of his debt; but of late they will not do it, but where three years interest is sworn due. This rule of courts of equity, is only in favour of remainder men, and heirs, but is also to the advantage of him who has the inheritance immediately before him.

\* 651

## *Ne exeat Regnum.*

*Ne exeat Regnum, what.*

A *Ne exeat Regnum*, is a writ to restrain a person from going out of the kingdom, without the leave of this court; it is called a state writ, and as such it issues, to restrain a subject from going out of the realm, without the king's licence: And heretofore it is said, it was to be tenderly made use of, but now it is become the common process of the court.

**RULE.**  
In what cases granted.

By the 80th general rule, where any bill is filed in equity against any person or persons, that have no visible estate in the kingdom, and it shall appear by affidavit, that the defendant absconds, and is making away his effects, designing to depart the kingdom, whereby the plaintiff in such bill, may be in danger to lose his debt, that in all such cases, upon application made by petition to the court, or any of the barons (wherein the substance of the plaintiff's complaint, is to be inserted and sworn to) and on producing a certificate of the bill being filed, and no answer, an order for issuing a writ *Ne exeat Regnum* will be granted upon the grounds aforesaid.

\* 652  
Ibidem.

In the case of *Fling against Hall and others* in this court Hilary term 1749, a question arose, if this court has a jurisdiction to grant this writ; on the one hand it was said, that it must issue from Chancery, that it was formerly a state writ and issued from Chancery in state affairs only, but that the court of Chancery had, in favour of the subject, applied it in private matters between party and party, as in this court in a cause on an outlawry, the king's prerogative is applied to the benefit of the subject. But in answer to this it was urged, that this writ is necessary in this court, for carrying on and transacting the business of it, and as it had been always granted, when properly applied for, as appeared by several precedents produced to the court, and no instance appearing of its having been ever refused, they saw no reason for altering the practice.

### *Ne exeat Regnum.*

ad the writ was granted. The precedents produced were  
against *Callan*, 11th June 1744; *Toole* against *Kelly* and  
*Jan*, 11th February 1745; and *Burnet* and *Wallace* against  
*Wallace* 14th June 1748.

In Coke's 2d Inst. 556, it is said, that a *Ne exeat Regnum* may Ibidem  
be by the king's writ under the great seal, or by command-  
ment under the privy seal, or under the signet; for in this  
case, the subject ought to take notice as well of the privy seal  
and signet, as of the \* great seal, for this is but a signification  
of the king's commandment, and nothing passeth from him.  
Then it issues under the signet, it may well issue under  
the Exchequer seal, which is of much greater weight than the  
signet. See also *Fitz. Natur. Brev.* fo. 85.

\* 653

In the case of *McCormick* against *McClurcan* in this court in Ibidem.  
after term 1728, a *Ne exeat Regnum* was granted, upon an affi-  
avit that the defendant threatened to leave this kingdom.

And this writ is commonly directed to the sheriff, to cause To be directed  
the defendant to come before him, and give sufficient security  
that he will not depart the realm without the leave of the  
court; and on his refusal to give such bail, or surety to the  
sheriff, he is to commit him to the next prison; and the she-  
riff is to make and return a certificate of such security to the  
court.

to the sheriff,  
and his duty  
thereon.

The court do usually name the sum for which the bond for The security to  
obedience to the writ shall be, and it is to be inserted be given by the  
in the body of the order, and also in the body of the writ,  
and generally the penalty is double such sum.

defendant.

It was formerly thought, that upon the party's putting in a Security to be  
answer, the writ should be discharged, but of late \* the entered into by  
party hath been obliged to give security to abide the order on recognizance in  
hearing, before the court will discharge the writ; which se-  
curity is taken by recognizance before the Lord Chief Baron,  
all other securities are, and is in the penalty of what is  
due.

in the court.

\* 654

But if the defendant can satisfy the court by answer, or How the defen-  
otherwise, that he hath no design of leaving the kingdom, dant is to get  
or is indebted to the plaintiff, then he may give notice, and himself dis-  
serve the court by counsel that the *Ne exeat Regnum* may be charged; and upon hearing counsel on both sides, the court  
will either discharge, or continue it, as they see reason.

charged.

Note, it hath been held an abuse of this process to break open It is an abuse of  
doors, and to take the party in bed; but yet the court for this this process to  
use would not order him to be set at liberty. See *Pract. Reg.* break open  
*Chan. 250, 251, 252.* doors, yet the court won't set the party at liberty.

A soli-

## Orders.

A *Ne exeat Regnum* grant-ed, tho' no bill in court. A solicitor's bill being taxed, and reported overpaid sum-pounds, the client, on motion and affidavit of his being about to go beyond sea, had a *Ne exeat Regnum*, tho' there was no bill in court whereon to ground this writ. *Preced.* in *Chanc.* 171.

\* 655

That this writ is grantable at the suit of a private person, and lies for a private matter without \* a bill. *Vide 1 Ch. Ca.* 116. *2 Ch. Rep.* 19. *Fitz. Nat. Brew.* 85.

A security in a *Ne exeat Regnum* refused to be discharged, tho' defendant was in prison for 19,000l. dec. was in no danger. *Chanc. Prec.* 230.

A surety in a *Ne exeat Regnum* was refused to be discharged, after the defendant had answered, even after a decree against him; for if (as it was urged) there was no danger of the defendant's going beyond sea, (being in prison) then the surety was in no danger. *Chanc. Prec.* 230.

## Orders.

IT is not intended under this head, to treat of the general and standing orders of the court; nor of such orders as are made on hearings, called decretal orders; but the orders here intended are chiefly interlocutory orders, which are, all orders made in the cause antecedent to the definitive sentence. See *Title Bill of Review*.

Interlocutory orders what.

\* 656

Orders by consent often out of the general rules or course of the court, but not otherwise.

And here it is to be observed, that there are many occasions intervening in a cause which require motions or petitions to set them right; now such directions as are given by the court on such motions or petitions are commonly called interlocutory orders; and those \* orders are of several kinds, and are either of course, or special: Sometimes they relate to the prosecuting or carrying on of a cause, and sometimes they are touching process, &c. At other times, they are founded on the standing rules of the court, and upon the particular circumstances of the case, and are made upon the application of some person either plaintiff or defendant interested in, or affected by the cause. When they are made upon hearing counsel on both sides, regard is always had to the general rules of the court but when they are made by consent of parties, they are often out of the general rules, or course of the court; in which cases, the special reasons moving the court to vary from the rules, are always expressed in such order.

## Orders.

All orders must be pronounced in court, and drawn up by the register from his minutes taken in court; of which minutes the attorney in court, or agent of each side may have a copy in order to be informed of any thing that is special therein. And if in special cases any difficulty or doubt arises in the minutes, the parties may attend the register about explaining them; and if by this means they cannot be settled to the satisfaction of the parties, the court may be applied to by counsel to explain or amend them. And the court \* will order the register and all parties to attend by their counsel thereon; and the court will then make such order about rectifying the minutes as they shall see cause.

Of drawing up special orders.  
Copies of the minutes may be taken by each party, and if any difficulty or doubt arises in the minutes of any special order, the court will rectify it.

\* 657

But with respect to orders of course, or such orders as are not in special cases, there is no occasion to take a copy of the minutes, &c.

Of drawing up, passing, entering and serving orders.

When an order is to be drawn up, the attorney for the party who is to have it, is to leave with the register the notice, last order (if any) and the brief, or other proper instructions; and from these, and his minutes, he draws the order; and when it is properly settled, it is to be attested by the chief remembrancer or his deputy, and then to be entered in the book of orders, after which and not before, regularly, it may be served on the other side; for all orders must be passed and entered before allowed or served. And if either party expects any use or benefit by an order, it must be first drawn up, passed, and entered in this manner.

The register to read over in court all special orders after they are pronounced.

\* 658

By the 51st rule, *pars*, when any motion is made, the last order is always to be produced, and any order obtained without producing the last order to be void, and the costs occasioned by the neglect, to be paid to the party grieved.

RULE:  
*Pars*, the last order to be produced on every motion.

The officer in drawing up such orders, always mentions the next precedent order, in which great care ought to be taken that it be fully and truly recited, lest a mistake therein should vitiate the order.

And in drawing up of orders, the last order is generally recited.

After orders are entered, they may not only be altered, but even discharged on good cause, by special direction of the court; and when a party moves to discharge an order, he must have it drawn up ready to be produced to the court.

Orders may be altered or discharged on good cause.

## Orders.

Of making orders nisi, absolute.

\* 659

A motion to make an order *nisi*, absolute, is not to be made until after the day given to shew cause; and upon this motion, an affidavit must be produced of the service of the order, and a certificate from the officer of no cause being shewn to the contrary, and \* then, if upon the motion no cause is shewn, the court makes it absolute.

The method to be observed in serving orders.

The usual way of serving an order, (except where personal service is requisite, or directed by the court) is by giving a copy thereof to the attorney for the opposite party anywhere, at the same time shewing him the original order attested as aforesaid, or it may be served by delivering a true copy thereof to his clerk at his office; or to his wife, or his servant, or child, above the age of sixteen years, at his dwelling house or place of abode.

In what cases they may or may not be served.

As to contempts for disobedience of an order, the party must generally be served with the order, before it can be deemed a contempt for not obeying it: But if the party was actually present in court when the order was pronounced, or if he be a servant or minister of the court, upon whom the order is made, as an attorney, &c. it may be otherwise; because he is supposed to be present, and to know what passed in court. And if the fault be against a standing order of the court, there needs no notice of it. *Pract. Reg.* 102. But it is the better way to serve the order.

A submission to an award may be made an order of court.

\* 660

The office fees for conditional and absolute orders.

By the Statute 10th *William* 3d. *Sess.* 2d. 6th. 14th. a submission to an award may be made an order of this court, \* on producing to the court an affidavit of the perfection thereof.

No order on an affidavit to be signed till affidavit be filed.

An attorney may assent to an interlocutory order, but not to a reference finally to determine.

The officer is not to draw up, or sign any order grounded upon an affidavit, unless it be first filed.

An attorney's assent to an interlocutory order may bind, but not to a reference finally to determine. *1 Ch. Ca.* 87.

A person may be brought into court to answer on interrogatories touching the breach of an order within

a year, but after the breach to be set forth by bill.

If one is brought into court to answer the breach of an order, if within the year, he shall answer upon interrogatories without a bill: But if after the year a bill ought to be filed to set forth the breach. *Dansv.* 776. *1 Har. Ch. Pract.* 3d. *Edit.* 188.

The

## Orders.

The court gave leave to rectify a mistake in the title of an order, tho' against a surety that gave a recognizance to abide the order of hearing. *2 Vern. 376.* A mistake in the title of an order amended, tho' against a surety.

Where one party obtains an order, the other party may use the same \* without motion. *2 Har. Ch. Pratt. 441. 2d. Ed.*

If one party obtains an order, the other may use it of course.

\* 661

Orders on consent or agreement of the parties or attorneys, not binding on infant or *feme covert*.

Orders are often made by the court on the agreements or consent of the parties, or their attorneys in court; but the court generally asks what they are for, or whether there be any infant or *feme covert* in the case, for if there be, the court cannot make the agreement or consent of the parties an order of the court, because no infant or *feme covert* can be bound thereby.

Where by an order of this court a party is to shew cause why an attachment or other matters should not be awarded against him, and that such order has been irregularly or surreptitiously obtained; in such case, he is to apply by counsel to set aside the order, and not to shew cause against it, for the court will not knowingly suffer an improper order to stand: But if the party comes to shew cause, he admits the regularity of the order, and must be determined by the merits of the case.

Moving to shew cause against an order irregularly obtained, the regularity is admitted; the motion must be to set it aside.

In the case of *Thomas against Place*, in this court, Michaelmas term, 1755, there being several defendants to the bill, and a commission of rebellion having issued against some of the defendants, who were in contempt for not answering; a motion was made to set aside the commission of rebellion, for that there was \* no order to support it, the parties in contempt being only made parties to the order, so that it was not an order in the cause; and for this reason, the commission of rebellion was set aside, altho' it appeared, that the officer who enters the rules, only makes those defendants in the rule, against whom the process issues, and that the process can only issue against those, and that the parties to the cause are not set forth in the attachment, and that this was the constant course: But the court said, that this was an improper way of entering the rule, that in the title of the cause, it ought to be against the parties in contempt, and others; but in the body of the rule, the process should be only ordered against the persons in contempt.

Orders how to be drawn up, where there are several defendants, and especially on issuing process of contempt against some of the defendants only.

\* 662

## Orders.

### Of Leading Orders.

Leading order what.

\* 663

Quantum  
damnicatus.

Proceedings  
thereon.

\* 664

Ibidem.

Ibidem.

WHEN the court, upon the hearing, doubts of some intervening fact material in the cause, which often happens, when the proofs relating to such fact are opposite and contradictory, or uncertain; or where a plaintiff goes into a court of equity for damages which are uncertain, and not to be settled but by a jury, and the defendant answers and contests without demurring; in such and the like cases, the court will direct an issue at law to try the fact, or the *quantum* of the damages as the case is, and this is called a leading order.

And by this leading order in this court, the plaintiff is ordered to commence forthwith a feigned action in the Pleas Side of this court, and that the defendant do forthwith appear thereto, and plead the general issue, and admit of all matters of form, so that a trial may be had, by a jury of the city or county, where the court shall direct the trial to be, on the issue expressed in the order: And the sheriff of the county or city, where the trial is to be, is ordered to return the grand panel of the freeholders to the chief remembrancer of this court, who is desired to strike a jury thereout for the trial of the issue; and either party are to be at liberty to read and give in evidence on the trial, the deposition or depositions of such witness or witnesses who by reason of death, or any other lawful cause, to be made appear by affidavit, cannot attend the trial. And if a sufficient number of the jurors shall not attend the trial, the judge before whom the trial is to be had, is by the order desired, at the request of either party, to grant a *hal*, and also \* to certify such verdict as shall be given on the trial.

And when this order is made out, it is to be served on the opposite party, and settled and signed in the same manner as other interlocutory or decretal orders are. See *Title Domes, &c.* And when it is signed by counsel, and attorneys on both sides, and by the chief remembrancer, it is to be brought to the clerk of the Pleas office of this court, to be entered by him in a book which is kept for that purpose in his office; and when it is entered there, he is also to attest it, for which you pay 1s. 6d. fees: And it is afterwards to be signed by the chief baron, whose fee is 6s. 8d.

When the leading order is brought to the clerk of the pleas office as aforesaid, if the defendant has appeared, the plaintiff's attorney may at the same time file his declaration [at the foot of which he is to write, that it is upon a leading order, that no rules to plead may be entered thereon, for, by the order, the defendant is to plead to issue.] And let him give

### Orders.

the defendant's attorney notice that the declaration is filed, and request him to file his plea forthwith; and when the plea is filed, he may get a short order drawn up in the chief remembrancer's office for the \* sheriff to return the grand panel or book of freeholders, to the chief remembrancer, who in presence of attorneys on both sides, is to take thereout the names of forty-eight persons, from which each attorney shall strike out twelve, and the remaining twenty-four shall be certified by the chief remembrancer as the jury to be impanelled by the sheriff to try the issue: But the sheriff generally returns the grand panel without requiring to be served with such particular order, and the record is then to be made up and tried as in case of a special jury at common law.

\* 665

If the attorney for either party shall neglect to attend the *Ibidem* officer, he may after service of one summons proceed *ex parte*, and strike twelve for the attorney, who makes default. *Quær.*

When the trial is over, the party in whose favour the verdict is, may get a certificate thereof from the judge who tried the cause, and upon motion of his attorney thereon in the Equity Side of this court, an order is made to confirm the same, unless cause; and if no cause be shewn to the contrary in four days after service of such order, then the attorney may, on producing the order, an affidavit of the service thereof, and a certificate from the chief remembrancer of no cause being shewn, have \* the last order made absolute, and may at the same time, upon motion, obtain another order that the cause may be set down to be heard on the certificate of the verdict and the merits, which last order is to be served upon the opposite attorney four days before the day appointed for the hearing, exclusive of the day on which it is served.

And upon the hearing, the plaintiff is to produce the order *Ibidem* for hearing, an affidavit of the service thereof, the certificate of the verdict, and the absolute order for confirming it: But the plaintiff need not in this case serve a *subpana* to hear judgment.

If the defendant neglects or refuses to appear, or plead in time, so that a trial cannot be had pursuant to the order, in such case the plaintiff may apply to the court to have the order renewed, and another day appointed for trial, and that the defendant may in a short day enter an appearance in the Pleas Side of this court, and may also plead in a short day after the plaintiff hath filed his declaration, or that the issue may be taken as if found against the defendant, and the court will make an order for this purpose: And if the defendant shall in either case again make default, upon certificate thereof, and upon affidavit of the service of this \* last order, and upon motion of counsel thereon (without notice,) the court will make the

\* 666

How to proceed in case the defendant shall neglect or refuse to appear and plead in time, so that a trial, cannot be had pursuant to the order.

\* 667

## Orders.

the order absolute, and will proceed in the cause as if the issue had been found against the defendant: And note, it is said, that it has been sometimes practised to apply for this order, at the same time that the issue is directed, especially where the plaintiff has reason to apprehend that the defendant is inclined to give delay, and that it has been granted.

And how if the plaintiff delays.

So if the plaintiff after the defendant has appeared, does not file his declaration in time, the court on motion of the defendant's counsel, on notice duly served, and on a certificate of the defendant's appearance, will compel the plaintiff to file his declaration in a reasonable time, or that the issue may be taken as found against him. See *Archdale against Morris, Trinity* 1752. The like in the same case, *Trinity* 1754.

Ibidem.

And if the declaration be not filed in the time prescribed by the order, the court, on motion of counsel (without notice) on an affidavit of the service of the order, and a certificate of no declaration filed, will proceed as if the issue had been found against the plaintiff, and make such order in the cause as shall seem meet.

\* 668

The court of Chancery will give costs for not going to trial on an issue directed.

If an issue be directed out of Chancery to be tried, and the party plaintiff in the issue gives notice of trial, and does not countermand it in time, upon motion, the court of Chancery will give costs, and not put the defendant to move the court of law, where the issue is to be tried. *2 Williams*, 68.

Court of Chancery to be moved for a special jury, where an issue is directed, if requisite.

So on an issue being directed out of the court of Chancery, after such issue made up, it is proper to move the court of Chancery for a special jury, if the circumstances of the case require it, and the court will grant the same; as they did in the case of the *Attorney General and Snow*. *2 Williams, Rep.* 27.

Costs at law and in this court allowed.

When by an order of this court, proceedings are had at law to try the issue, or the like, the party shall have his costs at law allowed, as well as his costs in this court.

Where the court can determine the matter, it shall not be an handmaid to other courts, nor beget a suit to be ended elsewhere: And, therefore, where a trial at law was pressed for, whether there was a new publication or not, it was said, the cause must properly end here; and where the court has a jurisdiction as to the end, it must have likewise as to the means: And if the court \* is fully satisfied as to the evidence, they will not send it to a trial at law. *Treat. of Equ.* 131.

\* 669

Of the nature of an issue at law, and where to be directed.

For an issue at law (as has been said before) is a feigned issue in an action upon the case, directed by the Chancery for the better informing and guiding the conscience of the court:

And,

## Orders.

And, therefore, no issue ought to be directed to try a matter fully proved in the cause. *Ibidem.*

So, where the proof of deeds is very plain, it would be dangerous to direct an issue to try the reality of them; neither is it proper to direct an issue, whether there be a trust or not, especially where a trust appears by implication from the nature of the case. *Ibidem*, and 132.

Ibidem.  
Seldom granted  
to try whether  
there be a trust  
or not.

And regularly an issue ought not to be directed, to try a title not alledged in the plaintiff's bill: Yet, if upon the hearing, a matter not in issue does appear to the court, which goes to the very right, the court will sometimes order an issue at law to try it, and decree thereupon. *Ibidem.*

In what cases  
an issue should  
or should not be  
directed.

And issues are frequently directed where matters of law are mixed with matters of fact; because the judges can explain to the jury, what the law would \* be if they should find the facts. *Ibidem.*

Where matters  
of fact and  
matters of law  
are mixed.

\* 670.

When an order  
may be obtained  
for a new trial.

Although in all issues, directed by the court of *Chancery*, either party may apply for leave, and obtain an order for a new trial; yet this seldom comes to any thing, unless the judge, before whom the cause was tried, certifies his dissatisfaction of the verdict, or that it is fit to undergo another trial; there the party shall have another trial, upon payment of the costs of the former trial.

Rule in equity,  
that an heir shall  
not be bound  
down by one  
single trial.

But still it is taken as a fundamental rule in equity, that the inheritance of an heir at law shall not be bound down by one single trial: He may have another trial for asking for; but if the second verdict goes against him, he will not be intitled to a third trial for asking for. And where verdicts have gone several ways, it has always been the wisdom and policy of the court, to decree according to the majority of these verdicts, or else there never would be an end of the matter in question: And perhaps it may be better to deny another trial, than to have the parties in an eternal dispute.

Comp.

\* 671 \* *Commissions of Partition, to ascertain the bounds of any Lands, adjoining to any Bog, Moss, or Lough, &c, on the Statute 5 Geo. 2d. Ch. 9.*

WHEREAS there are great tracts of unprofitable bog, and low grounds, over-flowed by rivers, loughs, or the sea, which might be taken in, drained, and improved, if the property thereof was settled, and due encouragement given thereto.

Unprofitable land, where the property is unsettled, may be ascertained.

An English petition to be exhibited.

\* 672 And to be served on all the persons concerned: And on affidavit thereof, a commission to issue to examine witnesses. Fees of the commission.

It is enacted, by the Statute 5th Geo. 2d. Ch. 9, where any person shall be seized or possessed of any lands, adjoining to any bog, moss, or lough, or to ground between the flux and reflux of the sea, and shall be desirous to ascertain the bounds thereof with the proprietors of the other lands adjoining to, or on the other sides of the same, such person may exhibit an English petition in the court of Chancery or Exchequer, against the proprietors of the other part of such bog, &c. or of the lands thereto adjacent, desiring such bounds to be ascertained; and upon proof made by affidavit of such proprietors, and the tenant \* in possession, being personally served with copies of such petition, at least thirty days before the time appointed for hearing thereof, the court may issue a commission to seven or more commissioners; for which commission the same fees shall be paid, as for a commission to examine witnesses, requiring such commissioners, or any five or more of them, by examination of witnesses upon oath (to be administered by them) and by the verdict of twelve men, to be returned, on the precept of such commissioners, by the sheriff of the county where the lands lie; or if they lie in two counties, then one equal moiety of such jury to be returned out of each of the counties, by the several sheriffs thereof, to enquire and ascertain the old bounds of such bog, &c. if there be any such; but if no such, then to make and ascertain such reasonable bounds between the petitioners and the other proprietors in the petition, having regard to the length of the profitable land adjoining to such bog, &c. belonging to such several proprietors, as to them, or the major part of them, shall seem reasonable.

The commissioners, &c. may lay out and ascertain drains.

\* 673

Where a drain is necessary to carry off the water from such bog, &c. the said commissioners, &c. shall lay out and ascertain the same, and the length, breadth, and depth thereof, and order \* what proportion thereof shall be made by the said several

## *Commissions, &c.*

several proprietors, with regard to the benefit that each of them may receive thereby; and the said commissioners, &c. shall return, under their hands and seals, into the court out of which such commission issued, what they have done by virtue thereof; whereupon the court may make such orders for confirming, altering, or amending such return, or may set aside the same, and issue a new commission, as the court shall think reasonable.

The commissioners to make a return to the court, of what they have done. And the court may make orders thereon, as they shall see fit.

If no complaint be made to the court against such return, within thirty days next after filing thereof, if it be filed in term-time, or in the next term after the filing, if filed in the vacation, from thenceforth such return shall stand and be confirmed; and such return, so confirmed, &c. and any order thereupon made, shall bind all parties to the said proceedings, and all persons claiming or deriving any estate, &c. in or to the said lands, or any part thereof, by, from, or under them, or either of them.

The time for complaining against such return. And when confirmed, to be binding to all parties concerned, &c.

Provided no less than twenty-four men be returned, out of which such jury may be taken, to whom challenges may be taken by the said parties, as on trials in actions at law.

No less than twenty-four to be returned, for the jury to be taken thereout, and challenges may be taken.

\* If any of the said proprietors, after three months notice in writing given to them, shall neglect or refuse to make his proportion of such drain, according to such order, then the other proprietors may make such drain, and sue such proprietor, neglecting, by civil bill, at the assizes for the county in which such drain, or any part thereof, lieth, or at the quarter-sessions, if in the county of Dublin, for the sum his proportion amounts to.

\* 674

The remedy against any proprietor refusing to make his proportion of the drain.

Provided no one proprietor shall pay more than one shilling and six-pence for each perch, containing twenty-one feet in length, or more than ten pounds in the whole, towards making such drain, in any one year.

If any such proprietors, who shall make such drain, or against whom any such sum of money shall be recovered, as aforesaid, are only tenants for life or years, such tenants, after the determination of their estates, their executors, administrators, and assigns, shall hold such bogs, &c. until out of the rents, &c. thereof, they are paid the sums following, viz. if such proprietor, at the time of filing the said return, be possessed of a term less than seven years, then until he be paid such sums as he hath expended, or have been recovered against

What each proprietor is to pay. The allowances to be made to tenants for life, or years, &c. their executors, administrators, or assigns, for their expence of such drain.

And may hold such bog, &c. after the estate or term, until satisfied thereout.

him

\* 675

him as aforesaid: But if at such \* time he hath seven years, then until he receive three parts in four of such sums; but if he be then a tenant for one life, or by the courtesy, or in dower, or have fourteen years, then until he or she receive two parts in three of such sums; but if he have then two lives, or twenty-one years, then until he be paid one fourth part of such sums; but if he hath then a term of three lives or thirty-one years, or any greater or longer estate or term, he shall have no allowance for such drain, when such estate or term is determined.

The proceedings to obtain the commission.

\* 676

The petition is to be drawn up and signed by counsel and attorney, and to be filed in the chief remembrancer's office, and then a motion is to be made to the court by counsel, on an attested copy thereof, and thereupon the court will appoint a day, and will order the several proprietors, or persons mentioned in the petition, to answer the matter thereof in thirty days after service of the said order; and the petition is to be set forth at large in the order; and when it has been served in such manner as is directed by the statute, if none of the parties served shall answer the same, on affidavit of such service, and a certificate of no answer being filed; and on counsel's motion, and proper notice given, the court will order the defendant to return commissioners names in \* a week after service of the order, (and if there be several defendants, that they shall join in returning them) or the officer to seal them, and a commission to issue for that purpose.

A day to be appointed for hearing the commission, before it is served.

It was determined in the court of Chancery, in the case of *Richardson against Browne* and others, that a day must be appointed for hearing the petition before it is served. 27th July, 1749.

The proceeding on the petition.

Then, when the commission has issued, the commissioners issue a precept, under their hands and seals, directed to the sheriff of the county where the lands, &c. lie, requiring and commanding him to summon and give notice to a sufficient number of free-holders of the county, to enquire and ascertain the mears and bounds, and to return the same.

Ibidem.

\* 677

And the sheriff, on this precept, is to return a jury of twenty-four good and lawful men of the county, out of which the commissioners are to swear twelve, who are to perambulate the ground, &c. of which the bounds are to be ascertained; and to hear the evidence of all such witnesses, as shall be produced on the behalf of either party; and the verdict to be given by the said jury under their hands and seals is to be annexed to the commission, and the commissioners are to certify the same, and their proceedings, under their hands and seals.

And

*Commissaries, &c.*

And the commission and verdict, or inquisition annexed *Ibidem*, thereto, is to be returned, with the precept and certificate, to the court; and then a motion is to be made thereon, by counsel, to receive the partition pursuant to the statute, and to confirm it, unless cause, which the court will order; and all parties concerned in interest are to be served with this order: And if no cause be shewn against confirming the partition, in four days after service of the order, the court, on affidavit of the service of the order, and certificate of no cause shewn, will, on counsel's motion, confirm the order. See *Ogle* against the *Bishop of Dromore*, in this court, in 1737 and 1738.

If the parties, served with the petition as aforesaid, or any of them, shall answer and contest it, the court will hear it as a cause before the commission issues, and will make such order therein, as from the circumstances of the case shall seem fit and convenient.

\* **The FORM of the PETITION.**

\* 678

To the Right Honourable the Chancellor, Treasurer, Lord Chief Baron, &c. The form of  
the petition.

THE Humble Petition of  
, in the county of of  
Esq;

*Sherweth,*

THAT by an act of parliament made in this kingdom, in the fifth year of the reign of his present majesty, intituled, "An act to encourage the improvement of barren and waste lands, and bogs, and planting of timber trees," and so forth; it is, among other things, enacted, &c. (then recite the purview of the statute) as by the said act may appear.

That your petitioner being seized in fee of the lands of, situate, lying, and being in the lordship of  
in the county of and there being a large moss  
or bog, known by the name of  
bog, which bog is also a part and parcel of, &c. on, &c.  
here set forth the several lands which surround the bog, &c.  
and of which it is part and parcel, with the names of the several persons whose estates of inheritance, such lands, &c.  
are situate, lying, and being in the said county of

a great part of \* which said bog hath time immemorial been in the possession of your petitioner and his ancestors, and his and their under tenants, and the other part thereof, in the feizin

\* 679

seizin and possession for many years last past of the said  
and their several under tenants.

That there had been formerly an ancient marsh, mearing  
or drain cut thro' the said moss or bog, in order to pre-  
serve the several proprietors of the said several lands contigu-  
ous to the said bog, their several and respective properties and  
possessions therein distinct from each other, which was ac-  
cordingly held and enjoyed in severalty according to the said  
ancient mears and bounds, until lately, the said drain or  
mearing being suffered to grow up, the tenants of the said  
and have greatly incroached upon  
your petitioner and his tenants, their part of the said bog or  
moss, and have forcibly taken possession of a considerable part  
thereof.

That your petitioner had caused frequent application to be  
made to the said and to have the mea-  
and bounds of the said moss and bog examined  
into and ascertained, whilst several of the said inhabitants of  
the said lands are living, and who only can prove the mea-  
and bounds thereof, and who are now very ancient and in-  
firm, all which \* the said and have de-  
clined hitherto to do.

\* 680

May it therefore please your lordships to order a commis-  
sion to issue to proper commissioners, directed to en-  
quire into and ascertain the ancient mears and bound-  
es of the said moss or bog; and if no such an-  
cient mears or bounds shall appear, then in that case to  
make and ascertain such reasonable mears and bounds  
between your petitioners said estate and lands, and  
those the lands and estate of the said and  
as to the said commissioners shall seem meet, pur-  
uant to the said before recited act of parliament.

And your petitioner will pray.

N. B. If the petition be to make and ascertain bounds where  
no old bounds have been to such moss, bog, &c. in such case,  
the petitioner must set forth in his petition how far the profit-  
able land of his estate or farm extends, by the edge of the  
said bog, &c. and the remainder of his petition is to be fram-  
ed accordingly.

County of

To wit.

A. B.  
Plaintiff  
J. Ld. B. of  
J. R. H. M.  
L. S. W.  
Srs. Defts.

WHEREAS a commission of partition hath  
issued out of the Chancery side of his ma-  
jesty's court of Exchequer in Ireland, and under  
the seal thereof in this cause directed to us,  
*V. J. M. W. J. B. P. M. T. S. J. S. T. W. L.*  
Esqrs. as commissioners appointed in and  
by the said commission to ascertain the mears  
and bounds of the bog and moss, called the      near, &c.  
in this county, which said commission bears test the  
day of      and is returnable into the said court of Exche-  
                er in      next coming.

We therefore by force of, and in obedience to the said com-  
mission, do issue this our precept, and thereby charge and  
require you to summons, and due notice give to a suffi-  
cient number of freeholders, good and lawful men of the said  
county of D.      to be on      the      day of  
next in the forenoon, at, &c. to be of the jury, to enquire of,  
and ascertain the old mears and bounds of the said bog or  
moss, if any such there be, and if none appear to them, then  
to lay out and ascertain such reasonable\* mears and bounds  
between the plaintiff and defendants, with regard to the length  
of the profitable lands adjoining thereto, as to the said com-  
missioners, or the major part of them, shall seem reasonable,  
where you are to have the names of the said jury, and the  
return of this precept: Given under our hands and seals  
this      day of

E. T. Esq; High  
Sheriff of the said  
County of D.

V. J.  
M. W.  
T. W.  
J. S.  
P. M.

*Commissions, &c.*

*The Charge upon the enquiry and verdict.*

County of D.

To wit.

The names of the jury sworn, pursuant to the within precept.

<i>A. B.</i>	
Plaintiff:	
<i>B. of D.</i>	{
<i>R. H. M.</i>	
<i>B. S. W.</i>	
Defendants.	

1 <i>H.</i>	<i>C.</i>	2 <i>J.</i>	<i>W.</i>	3 <i>J.</i>	<i>P.</i>	4 <i>M.</i>	<i>S.</i>
5 <i>R.</i>	<i>W.</i>	6 <i>T.</i>	<i>F.</i>	7 <i>J.</i>	<i>K.</i>	8 <i>E.</i>	<i>H.</i>
9 <i>R.</i>	<i>P.</i>	10 <i>F.</i>	<i>G.</i>	11 <i>W.</i>	<i>F.</i>	12 <i>J.</i>	<i>M.</i>

*Gentlemen of the jury,*

The charge to  
the jury.

\* 683

YOU are to enquire of, and ascertain the old mears and bounds (of the within named moss or bog) commonly called the, &c.) if any such appear \* to you to be; and if none appear to you, then you are to make, lay out, and certain such reasonable mears and bounds between the within plaintiff, and the within named defendant; having regard to the length of the profitable lands adjoining to said bog or moss, belonging to the said plaintiff and said defendants, as you shall seem meet and reasonable.

*The Finding.*

The finding.

We find the old drain leading from the said moss side by the end of that part thereof called the, &c. in Mr. M's estate, and so on from thence to that part of the said moss where we caused a pole and white flag to be erected thereon where some sods or turf were cut out this day by our order for the better ascertaining that part thereof to be the ancient marsh, division, mear and bounding, between the several estates of the said bishop of D. and of the said R. H. M. and that no other is, or was, the old and ancients mears and bounds of the said, &c. between the said bishop of D. or his predecessors, bishops of D. (for the time being) and the said R. H. M. Esq; and his predecessors. And we further find that from the part above described, where the sods or turf were this day so cut, by our order, in the said moss, and on in a direct line, to \* that part in the said moss, known by the name of the, &c. and so on from thence in a direct line leading to, &c. but to terminate at the verge of the county.

\* 684

### *Commissions, &c.*

to be the ancient and only mears and bounds between the said bishop of *D.* and his predecessors, bishops of *D.* and the said *A. B.* and his predecessors, and the above named *S. W.* Esq; and his predecessors; that, that mearing and bounding, is last above described, and no other is, or was the ancient mears and bounds of the said, &c. between the said bishop of *D.* and his predecessors, bishops of *D.* for the time being and the said *A. B.* and his predecessors, and those under whom he and they derive time out of mind.

And we further find and lay out, as a reasonable mearing and bounding between the said *R. H. M.* Esq; and the within named *S. W.* Esq; (no proof of any ancient mearings appearing to us) that from that part where we caused a pole and white flag to be erected in the said moss, in a direct line, to the extreme part of the said *A. B.*'s farm, in the said Mr. *W.*'s state, (being the marsh between the said Mr. *B.* and the said doctor *J.*'s farm, on the borders of the said moss) with regard to the length of the profitable lands adjoining thereto, to be a reasonable mearing and bounding in the said moss, between the said \* *R. H. M.* Esq; and the said *S. W.* Esq; their several estates.

\* 685

<i>J. H.</i>	<i>J. G.</i>	<i>H. C.</i>	<i>M. S.</i>	<i>E. H.</i>	<i>W. T.</i>
<i>H. W.</i>	<i>R. W.</i>	<i>R. P.</i>	<i>J. M.</i>	<i>J. P.</i>	<i>T. T.</i>

### *The Commissioners Certificate of the execution of the Commission.*

To the Right Honourable the Lord Chancellor, Treasurer, Lord Chief Baron, &c. The commissioners certificate.

By it please your Lordships,

B. Plaintiff. I N obedience to his majesty's commission of partition to us directed, and hereunto annexed, we humbly certify unto your honours that we on the day of, &c. proceeded in the execution of the said commission, and that the high sheriff of the county of *D.* pursuant to our precept to him for that purpose recited, returned a jury of twenty-four good and lawful men of the said county, in order to settle and ascertain the mears and bounds of the bog or moss in the said commission mentioned, between the plaintiff and defendants, out of which twenty-four, a jury of twelve good and lawful men were duly sworn, who (having perambulated the said moss \* or <sup>or</sup> and having heard the evidence of several witnesses produced

\* 686

## *Pauper.*

duced on the behalf of the said several parties respectively, returned to us their verdict, under their respective hands and seals, which said verdict we have annexed to the said commission: And we do hereby approve of, ratify, and confirm the said verdict, as far as in us lies, in every article and particular of the same. And we do hereby certify, that the mears and bounds of the said moss or bog, so found by the said jury, and ascertained, and laid out by their said verdict, are the true, ancient, and reasonable mears and bounds of the said moss or bog, between the plaintiff and defendants, respectively. All which we humbly certify, this      day of, &c.

V.	J.	T. S.
M.	W.	T. W.
T.	S.	S. C.

---

## *Pauper.*

### **Pauper.**

\* 687

**RULE.**  
The requisites  
to be performed  
to be admitted a  
*Pauper*, and the  
proceedings.  
*Ibidem.*

IT often happens that some persons may have right to an estate, or other thing, yet not wherewith to prosecute that right, or else may be prosecuted, or made parties to a suit, yet have not wherewith to enable them to make either \*a defence, or a discovery; in such cases this court will admit such persons, either to sue or defend in *Forma Pauperis*.

By the fifty second general rule, he that would be admitted in *Forma Pauperis*, must have a petition drawn up, setting forth briefly, the nature and substance of his case; the contents of which petition, he must by an affidavit at the foot thereof swear to be true; and also insert in such affidavit, that he is not worth five pounds in any worldly substance, (the matter in dispute excepted) and that he hath not assigned over his effects to any person whatsoever, to enable him to make such oath.

### *Ibidem.*

And when this affidavit is sworn, a baron is to sign the order of reference, to the counsel mentioned in the petition, to report whether the petitioner has any just cause of suit; and this order is to be wrote after, or under the affidavit.

The  
Vo

## *Pauper.*

Then the lawyer is to sign his report underneath the order, *Ibidem*.  
that he hath examined and considered the petition, and finds  
that the petitioner hath good cause of suit, which he certifies  
to the baron.

\* Then upon counsel's motion, on behalf of the petitioner, \* 689  
in the petition, affidavit, order, and certificate, the court *Ibidem*.  
will order the adverse party to shew cause (if any he can) in  
our days after service of the order, why the petitioner should  
not be admitted.

Then the opposite party is to be served with a true copy of *Ibidem*.  
the petition and affidavit, order of reference and certificate,  
and order to shew cause; and upon an affidavit of such service  
made and filed, and a certificate from the chief remembrancer,  
of no cause being shewn, why the petitioner should not be  
admitted, and upon motion thereon to be made by the attorney  
for the petitioner, after the said four days for shewing  
cause are expired, the order will be made absolute, and the  
*pauper* admitted.

The order to shew cause against the admittance of the *pauper*, *Ibidem*,  
should be personally served, if possible; but service at the  
place of the adverse party's abode will do.

And he that defends in *forma pauperis* is to observe the same A person ad-  
rules, only in this case, the certificate of the counsel is not  
necessary.

\* A person is not to be admitted a *Pauper* in more than one  
cause, without special order of court.

\* 689  
Pauper to be  
admitted but in  
one cause, without special order.

By the 74th general rule, where a *Pauper* sues in this court,  
and will not refer the matter in question, after that the defendant hath  
answered or pleaded; in such case, the court, upon  
motion of the defendant's attorney, will give the *Pauper* four days  
to shew cause why he should not refer, and if within that time,  
he will neither comply, nor shew good cause to the contrary;  
the court may *dispauper* him, if they think fit.

After a *Pauper* is admitted, no fee, profit, or reward (except *Pauper's fees*, which are clerk's fees only) is to be taken  
of the *Pauper*, by any counsel or attorney, or any officer of  
the court, for the dispatch of business, whilst it depends in  
court, and he continues in *forma pauperis*; nor shall any con-  
tract or agreement be made for any recompence or reward  
therewards: And if any person offending herein shall be dis-  
covered unto the court, he shall undergo the displeasure of  
the court, and such further punishment as the court shall  
inflict: And if any *Pauper* offend herein, he shall be *dispaupered*.

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H

and

### RULE.

A pauper plain-  
tiff, after the  
defendant hath  
answered or  
pleaded, must  
refer, if required  
so to do, or the  
court will dis-  
pauper him.  
What fees a  
pauper is to  
pay.

## *Pauper.*

and never again be admitted in the same suit, in *forma pauperis*. See Ord. Ch. 152. See 10th Cha. 1. Sess. 2. Ch. 17.

\* 690  
Ibidem.

\* But altho' the officers of the court take no fees, strictly so called, of a *Pauper*, yet they make him pay for the labour of writing, which is after the rate of two pence per sheet.

*Pauper* selling or contracting for the benefit of his suit, the cause to be dismissed.

*Pauper* may be dispaupered upon its appearing to the court that he is of ability to sue.

And if it be made appear to the court, that any *Pauper* has sold, or contracted, for the benefit of his suit, or any part thereof, while the same is depending, such cause shall be thenceforth wholly dismissed, and never again retained. 1 Har. Cha. Pract. 268. 3d Edit.

And as a party may be admitted in *forma pauperis*, at any time pending the suit, so he may be *dispaupered* at any time upon its being made appear to the court, that he is of such ability, that he ought not to be in *forma pauperis*: And in case of this nature, where it was shewed to the court, that *Pauper* was in possession, and received the rents of the land in question, the court ordered him to be *dispaupered*, tho' the defendant had a verdict at law, and might thereupon take writ of possession, &c. Ibidem.

But a *pauper* shall not be dispaupered for a small pension coming to him after he is admitted.

\* 691

But it was determined by lord chancellor *Jocelyn*, afterward lord *Newport*, in the case of lord *Doneraile*, against \* his dowager *Doneraile*, February 19, 1742, that a pension of 100 *per ann.* granted by the crown to a lady of quality, is no reason to *dispauper* her: But note, she was admitted a *Pauper* before the grant of the pension: And a cause was cited, where a *Pauper* being put upon half pay, (which was but 27*l. per ann.*) was not admitted as sufficient cause to *dispauper* him.

Both plaintiff and defendant may be admitted to sue as *paupers*.

Both plaintiff and defendant may be admitted in *forma pauperis*, in the same cause; but this has been complained as an abuse, for that it tends much to the disquiet of the court and encourages the parties to be vexatious. Yet where it is a matter of contest, and the matter seems dubious, the court will admit both plaintiff and defendant to sue and defend *forma pauperis*. 1 Har. Ch. Pract. 268. 3d Edit.

*Paupers* not to pay cost but to be personally punished, as the court shall think fit.

And if a cause goes against a *Pauper*, he shall not pay costs to the defendant, but he may be punished personally, as the court shall think fit, yet such punishment is very seldom inflicted. Ibidem. And see the said Stat. 10 Cha. 1 Sess. 2. 17.

Cannot discharge himself of costs he was liable to before his admission.

A person by getting himself admitted a *Pauper*, cannot discharge himself of costs he was liable to, precedent to his admission. *Moseley's Rep.* 68.

## *Perambulation.*

\* The plaintiff brought a bill in *forma pauperis*, and had a decree to recover the duty with costs, and the master taxed costs as usual, for persons not *Paupers*: But upon motion, the court ordered the plaintiff and his solicitor to make oath before a master, what they had paid, or were to pay, and that to be allowed, but no further. *Preced.* in Ch. 219. *Sed quarr.* for this was giving the defendant, who, was not a *Pauper*, the benefit of the admission, and of what the officers of the court and others seem rather intitled to.

\* 692

On a decree for a pauper plaintiff, for the duty and costs, he shall only have the costs he shall make appear he had paid, or was to pay.

Plaintiff allowed to bring a bill of review, without paying cost in the original cause, he swearing he was not worth 40l. besides the matters in question. 1 *Vern.* 261.

Plaintiff if poor may bring a bill of review, without paying costs.

In the case of *Nugent against Nugent*, in *Chancery*, 11th November 1749, the plaintiff was allowed to sue in *forma pauperis*, altho' it appeared to the court, that he had an annuity of 40l. a year, a charge on the defendant's estate, and although his wife had an interest in some houses; but it appeared to the court, by the defendant's affidavit, on the motion to shew cause against the admission, that he had stopped the plaintiff's annuity, \* for some time, to reimburse himself a sum which the plaintiff had received over and above his annuity, he having been in receipt of the rents of the defendant's estate: And it having also appeared, that the wife's fortune was settled on herself, and that the husband, the plaintiff, had no power to intermeddle therewith.

\* 693

A person may be admitted in *forma pauperis*, altho' he hath an annuity, if he be not in receipt of it, and altho' his wife hath a fortune, if he has not a power or control over it.

## *Perambulation.*

BY the 78th general rule, commissions of perambulation are to issue of course, (as heretofore) upon a joint bill, to be signed by counsel and attorney on both sides, or by consent of the defendant, or his attorney in writing, and so to be sped pursuant to a general order of instructions of this court, bearing date the 3d of July, 1699, a copy whereof is to issue, and be affixed to the said commission as thereby is required; but such commission not to prejudice any other persons who are not parties thereto.

RULE.

Commission of perambulation, the proceedings in obtaining it.

This writ ought to be sued with the assent of both parties, where they are in doubt of the bounds of their lordships, or of their towns; then they, by assent, may sue this writ, directed unto commissioners appointed to \* make the perambulation,

In what cases granted, and generally by assent of parties.

\* 694

## *Perambulation.*

lation, and set the bounds and limits between them in certainty.

Commissions of perambulation sometimes granted without consent of parties; and in what cases, and for what purposes.

In cases where commissions of perambulation are requisite, though the parties do not consent, the court often decree several sorts of commissions, as to distinguish, to divide lands, to separate by oaths of witnesses, to view and certify incroachments, to survey and examine the mears and bounds of lands; in which case the surveyor-general is usually ordered to appoint two indifferent surveyors, who return their survey, and certify to the court what they do; which certificate being confirmed, the cause is set down thereupon and upon the merits, and the court do then decree according to the exigency of the case.

May be for diverse towns, and in diverse counties.

The parties ought to appear; if they cannot, should empower others to appear for them by *deditus*.

\* 695

And in *Fitzherbert's Natura Brew.* 134 (B) it is said, that a perambulation may be made for diverse towns, and in diverse counties; and the parties ought to come in person into the *Chancery*, and there acknowledge and grant, that a perambulation be made between them; and the acknowledgement shall be enrolled in the *Chancery*, and thereupon the commission shall issue forth: And if the parties cannot come into *Chancery*, then they ought to sue forth a writ of *deditus posse factum*, directed to certain persons to take their \* acknowledgement, and to certify the same into *Chancery*, under their seals, &c. and then, upon that certificate returned into *Chancery*, that commission or writ may be granted, although the parties do not appear in person in *Chancery* to pray the same.

Commission of perambulation to trace out the mears and bounds of lands, and the proceedings thereon.

Where the true mears and bounds of lands, between two or more proprietors, are uncertain and in dispute, in such case, any one or more of the proprietors may cause a bill to be filed, against the other proprietor or proprietors, and therein pray for a commission of perambulation, for tracing and setting forth the true and ancient mears and bounds of the lands in dispute.

Ibidem.

And the court, upon the hearing of the cause, will accordingly award a commission of perambulation, which is usually directed to four commissioners, two to be named by the plaintiff, and two more by the defendant, empowering them to enter upon and perambulate and trace out the mears and bounds between the lands in dispute, and also to examine all such witnesses as shall be produced before them, as well on behalf of the plaintiff, as of the defendant. See the case of *Sir Peter Leicester against Weldon* in *Chancery*, *Trinity term, 1751.*

\* 696

\* The instructions for executing the commission of perambulation, are contained in the order or decree, and also shortly expressed in the commission, to which the decretal order is usually

## Perambulation.

usually annexed. And it is usually inserted in the order, that in case the plaintiff and defendant shall not agree in the nomination of one or more surveyor or surveyors, then the surveyor-general to appoint an able and sufficient surveyor to take the survey; and sometimes it is ordered, that he shall appoint two surveyors; and it is also sometimes ordered, that for the benefit of all parties, and to prevent any further disputes, that the map be lodged in the surveyor-general's office.

If the parties do not agree in the nomination of a surveyor, the surveyor-general is to appoint one.

If the parties do agree in the nomination of a surveyor or surveyors, then an agreement or consent in writing, to that purpose, is usually entered into between the parties, which may for safety be made a rule or order of the court. If they do not agree, then a short order is to be made out to the surveyor-general, who, upon receiving the same, will nominate and appoint one or more able and sufficient surveyors, according to the order. See the case of the executors of *Ryan* against *Spaight*, in this court, *Easter-term, 1743.*

If they do agree, a consent is to be entered into.

\* And in either case, when the commission is executed, the commissioners are to certify their proceedings in the premises to the court, by a certificate, which is to be indorsed on or annexed to the commission, and to be signed by all the commissioners who attended thereon; and a survey or map of the lands is to be returned therewith: The form of which certificate, I have inserted here, as well to shew the method of proceeding upon the perambulation, as the form of the certificate.

\* 697  
A certificate of the proceedings to be returned by the commissioners.

To the Right Honourable the Chancellor, Treasurer, Lord Chief Baron, &c.

May it please your Lordships,

P. B. } PURSUANT to a commission of perambula-  
plaintiff. } tion, in this cause directed to us, J. B. T. C. The form of  
A. W. } J. P. and W. D. we did, on the day of  
defendant. } , by virtue of the said commission,  
enter into the lands of S. and S. in the said commission mentioned; and having duly sworn M. G. of, &c. and P. K. of, &c. the witnesses produced for the plaintiff, as also J. K. of, &c. and L. M. of, &c. the witnesses produced on the behalf of the defendant; and having also sworn R. G. of, &c. \* surveyor, as a surveyor, as well on the part of the plaintiff as on the defendant, did proceed to perambulate the mears and bounds between the said lands of S. and S. And we, the said J. B. T. C. J. P. and W. D. did cause the said lands of S. and S. to be surveyed by the said R. G. and the said R. G. did, according to the mears, metes, and bounds, shewn and traced out by the said M. G. and P. K. witnesses produced on behalf of the plaintiff, on their oaths, survey the said lands of S. and S. and the mears, metes, and bounds between the said lands of

\* 698

## Perambulation.

\* 699

of S. and S. so shewn and traced out on behalf of the plaintiff, appear to us as follows, *to wit*, We began at the ditch on the road leading, &c. from thence to the place where, &c. (as it was traced) which said bounds are the bounds claimed by the plaintiff as the ancient bounds between the said lands of S. and S. And we the said J. B. T. C. J. P. and W. D. did also cause the said lands of S. and S. to be again surveyed by the said R. G. according to the mears, metes, and bounds claimed by the defendant, as the mears, metes, and bounds between the said lands of S. and S.; and the said R. G. accordingly did survey the same according to the mears, metes, and bounds shewn and traced out by the said J. K. and L. M. witnessess produced on the \* behalf of the defendants on their oaths; and the mears, metes, and bounds between the said lands of S. and S. traced out on behalf of the defendant appear to us as follows, *to wit*, We began at the ditch, &c. (as it was traced) which said bounds are the bounds claimed by the defendant as the ancient bounds between the said lands of S. and S. as by a map of the said lands, according to the different tracings by the plaintiff and defendant; and the depositions of the said witnessess hereunto annexed may appear.

All which we certify, and humbly submit to your lordships this      day of  
&c.

J. B.  
T. C.  
W. D.  
J. P.

How the certificate is to be returned.

And this certificate is to be returned with the commission, depositions, and the survey or map of the land, in like manner as other commissions and depositions are returned; and a duplicate of the map is to be also lodged in the surveyor-general's office.

\* 700

And when a certificate is thus annexed to the commission, the \* commissioners are to indorse upon the commission the following return:

The return to be indorsed on the commission.

The execution of the within commission appears by the depositions, certificate, map, and survey hereunto annexed.

J. B.  
T. C.  
W. D.  
J. P.

The hearing of the cause on the return of the commission.

When the commission, &c. are so returned as aforesaid, and filed, then publication is to pass, and the cause to be set down in the usual manner; and the court will decree according to the

## *Perambulation.*

the merits, and ascertain the bounds, and will grant an injunction, or such other process as shall be necessary for the execution thereof; but if there be a contrariety or uncertainty in the evidence, they will direct an issue at law. So ordered in the aforesaid case of Sir Peter Leicester against Weldon, in the court of Chancery.

So likewise, where a bill is filed for a partition of lands, A commission of perambulation, directed to certain commissioners as aforesaid, empowering them to enter upon and perambulate the lands where the partition is to be made, \* and to divide, distinguish, separate, and make an equal partition thereof, by distinct bears and bounds, to and among the parties to the suit. See thereon. \* 701

And the form of the certificate in this case, which may either be annexed to or indorsed thereon, is as follows:

WE the commissioners for the plaintiff and defendant, in the within writ named, have this day, that is to say, the day of , entered upon and perambulated the town and lands of C. in the said writ mentioned, and have divided, distinguished, separated, and made an equal partition of the said lands and premises, by distinct bears and bounds, to and among the plaintiff and defendant, that is to say, one equal moiety or half part of the said lands and premises, with regard to quantity, quality, and value, being arable land, pasture and mountain, to the defendant F. containing ninety-seven acres, as appears by a map annexed, being the south point of the said lands, as appears by the said map; and one hundred acres of arable land, pasture and mountain, unto the plaintiff J. S. being the other equal half moiety, or half part, with regard to quantity, quality, and value, lying in the north \* point of said lands, as appears by the said annexed map to be held by them or their heirs in severalty, from the other equal moiety or half part of the said premises, according to their respective rights: All which we humbly certify, under our hands and seals respectively, the day and year above written.

Form of the certificate indorsed on the commission.

\* 702

G. N. (Seal)  
J. S. (Seal)  
S. L. (Seal)  
S. G. (Seal)

And the map of the land is to be returned with the commission, certificate and decree; and in this case there is to be further hearing, but a motion is to be made, which may be made either by counsel or attorney, that the partition so confirm the petition if they see fit, and if no sufficient cause be shewn to the contrary.

In this case there is not to be any further hearing, but the court will

made,

## Pleadings.

made, pursuant to the decree, may be confirmed, unless cause which the court will order; and if no cause be shewn, in four days after service of the order, why the partition should not be confirmed, the court, upon affidavit of the service of the order, a certificate from the chief remembrancer of no cause being shewn against confirming the partition; and upon an attorney's motion thereon, will confirm the partition absolutely. See the aforesaid case of Smith and Fuller, Easter-term 1743.

\* 703

## \* Pleadings.

**R**eadings what, and the several sorts, and how to be prepared by counsel and attorney.

**A** PLEADING in the common acceptation, is the saying of the parties plaintiffs and defendants, or the matters insisted upon by each of them, in the progress of the cause which being ingrossed on parchment, and signed by the counsel and attorney in the cause, for either party (and sworn an answer or plea) is called a pleading, and are as follows to wit,

- |                       |                           |
|-----------------------|---------------------------|
| 1 <i>A Bill.</i>      | The plaintiff's pleading. |
| 2 <i>Answer.</i>      | The defendant's pleading. |
| 3 <i>Plea.</i>        | The defendant's pleading. |
| 4 <i>Demurrer.</i>    | The defendant's pleading. |
| 5 <i>Replication.</i> | The plaintiff's pleading. |
| 6 <i>Rejoinder.</i>   | The defendant's pleading. |

Which before-mentioned pleadings, are the ground foundation of all causes before they come to be heard in court.

**RULE.**  
No pleading allowed to be filed until the former pleading be taken out.

\* 704

**RULE.**  
Pleadings what to contain, and how to be prepared by counsel and attorney.

And note, by the 81st general rule, no answer shall be admitted to be filed, unless it shall appear in the office that copy of the bill hath been taken out; and no replication, unless in like manner a copy of the answer hath been taken out; and this rule is observed \* in the filing of all pleadings after the bill.

By the 10th general rule, *parc.*, counsel is to be careful, that bills, answers, exceptions, interrogatories, and other pleadings, do not contain needless repetitions of deeds, writings, records, in *hæc verba*, but only the effect and substance thereof, and that which is pertinent and material to be set down.

## Pleadings.

As to impertinencies, pleadings are said to be impertinent. Impertinencies when they are stuff'd with long recitals, or with long digressions of matters of fact, which are altogether unnecessary, what, and totally immaterial to the point in question; as where a man sets forth a deed (the substance or material parts of which are only prayed to be set forth) in *hæc verba*, where he stuffs his answer with long recitals, which are nothing to the purpose; as if in a bill of revivor, the party sets forth in *hæc verba*, not only the original bill and answer, but the whole proceedings in the cause; whereas all these being matters of record, and for which the party hath once paid for copies, he ought not to pay over again. Besides there is no occasion to set them forth over again in *hæc verba*, or to make an unnecessary repetition thereof; so that if no new matter arises \* by the abatement, it is sufficient to set them forth, in this short concise manner, to wit,

\* 705

" That your orator, in or about such a term, exhibited his original bill of complaint, in this honourable court, against such and such persons, to be relieved, touching certain matters and things therein contained, as by the said bill duly filed, and remaining of record in this honourable court, appears (carry it no further). That the defendant, such a day, put in his answer, as by the said answer remaining of record, may also appear: That witnesses being examined, publication passed, and the cause being at issue, came on to be heard such a day, when it was ordered and decreed so and so." And here are taken in the words of the ordering part of the decree very shortly, and no more than what is material to the revivor, &c.

The method of drawing a bill of revivor.

But note, if any new matter hath arisen by the abatement, *Ibidem.* which makes it necessary to add a new charge, that may be inserted in the bill of revivor; as the plaintiff may pray a discovery of assets in the hands of an heir, or executor, and a *subpoena* to revive and answer; in which case the \* defendant must answer thereto, and the court will then, upon an attorney's motion, order the cause to stand revived.

\* 706

And by the aforesaid tenth general rule, *pars*, all pleadings are to be signed by counsel, allowed to practice, with his own hand, being first perused by him in the paper draught, before it be engrossed, and the pleading to be fairly engrossed without tazures, blotting, or interlineations, and to be signed by the attorney in the cause.

RULE.  
All pleadings to be signed by counsel, and attorney allowed to practice.

In the case of *Woogan* against *Jones*, in this court, 31st May, 1731, an answer and plea sworn before lord *Burlington* the treasurer, and signed by Mr. *Newman*, an English barrister, was brought over here sealed, and an affidavit made, that it was not opened, or altered, and the answer was filed; but upon motion of the plaintiff's counsel, it was ordered, that the answer

signed by an English barrister, not allowed here.

*Pleadings.*

swer and plea should not be accepted of, in regard they were not signed by a counsel, allowed to practice here, pursuant to the order.

**RULE.**  
No person to counterfeit the hand-writing of any counsel to any pleading, and the penalty for so doing.

\* 707

By the 88th general rule, no person to counterfeit the hand-writing of any counsel, to any bill, answer, plea, demurrer, exceptions, or interrogatories, without authority from such counsel, by the paper draught of \* such bill, &c. or other warrant, in writing, from him; and any person acting contrary to this rule (unless the counsel will come to the bar and acknowledge that his hand was so put by his consent) to be committed, and such bill to be dismissed with costs; and such plea or demurrer to be over-ruled with costs, and the answer to remain on the file, and defendant to answer over with costs, at the election of the plaintiff, and not otherwise; and such interrogatories to be referred to one of the barons of the court: And should any of them be found to be leading, the depositions of such interrogatories to be suppressed according to a former rule. But if the interrogatories are not leading, then the party so counterfeiting the name of the counsel, to be committed as aforesaid; and further to give such amends to the counsel, as the court shall think fit.

**RULE.**  
Pleadings, if scandalous, good costs shall be paid to the injured party.

By the 20th general rule, if any pleading shall contain any scandalous matter, and upon reference and report shall so appear, both the parties and counsel, on whose side, and under whose hand-writing it passeth, shall pay good cost to the party injured; and such counsel shall receive the reproof of the court, and the crime will be adjudged more gross, if it shall appear that such pleading passed under his hand without a deliberate perusal.

\* 708  
On a scandalous answer, defendant ordered to pay plaintiff 100l  
The construction of scandal in pleadings.

\* A defendant was ordered to pay the plaintiff one hundred pounds, for putting in a scandalous answer. 2 Ch. Rep. 386. See *Bush. Rep.*

But as to scandals, there are many cases, where tho' the words of the pleading appear to be very scandalous, and highly reflecting upon the party, yet where the scandalous matter is a necessary part of the cause, and material to the case or defence of either party, or tends to a discovery of the very point in question, the court will not consider it as scandalous. And if such matter be charged in a bill, the court will compel the defendant to answer it, and especially, if the plaintiff offers by his bill to prove it. See the case of *Crofton* against *Crofton*, in *Chancery*, Trinity term, 1747.

*Ibidem.*

But where the scandal is altogether immaterial and foreign to the point in question, and no way relates to the merits of the cause, but is done merely out of pique and malice, or if

Pleadings.

defendant shall by his answer deny the fact, and that it will not be sufficiently supported by the plaintiff's proof; in either of these cases, upon the baron's report, the scandal shall be expunged, and the court will give the party costs for this action; and generally the party injured shall have full costs, and sometimes exemplary costs are awarded, according to the circumstances of the case.

\* 709

After an answer is come in, it is too late to refer the bill for impertinence, but never too late to refer it for scandal. *Bunbury's Rep.* 53. 304. *Woodivorth against Astley* \*

ferred for scandal after answer, but not for impertinence.

\* So after an order to refer an answer for insufficiency, it may not be referred for impertinence, yet it may for scandal. *Williams*, 312. *Ellison against Burgess*.

\* 710

So it is with an answer, after referred for insufficiency.

The defendant demurred to part of the bill, as being a matter scandalous, and that it ought not to be answered unto, but is held not the regular course. *1 Vern.* 107.

No demurring to scandalous matter in the bill.

If the plaintiff refers the answer for scandal and impertinence, and the master finds the answer neither scandalous nor impertinent, the plaintiff on excepting to the master's report, sets in his exceptions shew wherein, in what line or page, and how far the answer is scandalous or impertinent, in order that such part of the answer may be expunged by the master; if it is not sufficient in the exceptions, to say in general, that the answer is scandalous and impertinent. *2 Williams*, 1.

On an answer's being reported not scandalous or impertinent, if the plaintiff excepts to the report, he must shew specially wherein it is scandalous or impertinent.

It.

There is not any matter of practice in the books which appears to be settled than this, in regard to scandalous pleadings. It has been always the practice, not to refer a bill for impertinence after an answer, in regard to the defendant, by submitting to answer, waives the impertinence. So was a standing rule of courts of equity, until altered by lord chancellor Bacon in Michaelmas, 1725. *2 Williams*, 312, 313. That a bill might be referred for scandal, not only after answer, but after hearing, and even by a third person, not a party to the suit, as courts are concerned to keep their records clean, and without dirt or scandal appearing thereon. And on altering the old rule, his lordship said, that in the reason of the thing, the rule should not be as it was; for when the defendant has submitted to answer the bill, why should he after that procure the bill to be altered, and by that cause be made a new bill? Besides, it occasioned great delays; tho' it was stated by counsel, that it was an argument, the defendant did not move to refer the bill for delay, when he first answered the bill before he referred it for scandal. But as this determination in *Bunbury's Reports*, is the latest we met with, I have ventured to set it down as the proper practice in general, and as it would be very hard, that a matter of false scandal should remain against a man recorded for ever. It is well worth while to read the *Chancery's notes* of the arguments in the aforesaid case of *Crofton and Crofton, Chancery*, as no cause was ever better debated.

*Pleadings.*

As also where it  
is reported in-  
sufficient.

It seems to be a stronger case, where exceptions are made to an answer for insufficiency, and the master reports it sufficient, that the plaintiff in his exceptions to the master's report, should shew wherein the answer is insufficient. *Ibidem*.

\* 711

No excepting to  
the report, after  
the scandal is  
expunged, ei-  
ther in bill or  
answer.

\* Also, if a bill or answer be referred for scandal, and reported by a master to be scandalous; if the master has or has expunged this scandal, the party cannot then except to report, because, when the scandal is expunged, it cannot be made appear to the court, what the scandal was, and was the party's own fault, that he did not except to the report sooner. *Ibidem* 182.

On reference of  
pleadings for  
prolixity and  
impertinence,  
the baron is only  
to consider  
whether they be  
or be not perti-  
nent to the sub-  
ject matter.

It was determined in the case of *Judkins* against *Hicke*, this court, 25th February, 1757; That where pleadings referred to a baron for prolixity and impertinence, the baron only to consider, whether they be, or be not, pertinent to subject matter of the pleading. And in the same case, following doubts arose: Whether the baron is to expunge part which he conceives to be prolix and impertinent, which was urged to have been formerly the practice. But lord baron said, that would be taking upon him to judge of merits of the cause. Another question was, whether the baron was on the first reference, to point out in what particular the pleading was prolix and impertinent, or only generally to report it prolix and impertinent, and to point out the particulars on the \* reference; but the court said, that if the pleading was long, it might be an endless work for the baron to point out the prolixity and impertinence; and if he would not do so, the labouring oar would be thrown on the court; however the court seemed inclined to take it upon them; it was agreed by the parties, that the defendant should answer as he may, and the matter in debate to stand over.

\* 712

No objection to  
the order of re-  
ference for scan-  
dal, prolixity,  
and imperti-  
nence, after a  
report.

In the case of lord *Howth* against *Nugent*, in the court of Chancery, Hilary vacation, 1759, the plaintiff having excepted to the defendant's answer, for shortness and insufficiency, the defendant having allowed the exceptions, the plaintiff obtained an order for referring the answer, for scandal, prolixity, and impertinence; and the master having reported the answer neither scandalous, prolix, nor impertinent, the plaintiff excepted to the report. On the hearing on the report of exceptions, it was urged by counsel for the defendant, that after excepting to the answer for insufficiency, the plainti-

## Privilege of Parliament.

ld not refer for scandal, prolixity, and impertinence \* ; the court \* would not enter into this matter, the defendant having before complained of the order. It was then ed, that the scandal in the answer (if it was scandal) was imputation on one of the defendants of the cause, and not imputation on the plaintiff; but lord chancellor said, that objection was of no weight, for courts are to take care, no scandal shall appear upon the face of their pleadings, declared the answer scandalous.

\* 713  
The plaintiff may refer a defendant's answer for scandal, tho' the scandal affects another defendant in the cause, not the plaintiff.

## Privilege of Parliament.

Y Stat. 3d. Edw. 4th. Ch. 1. Whereas the privilege of every parliament and great council of this land of Ireland \* that no minister of the said parliament, coming or going to the said parliament, during forty days before and forty days after the parliament is finished, should be impleaded nor troubled by no mean. It is also enacted, that every minister, as lords, proctors, and commons, be discharged and quitted all actions, had or moved against any of them during the aforesaid; and this to endure for ever.

The privilege of lords and commons of parliament, as to suits &c. in forty days before and forty days after the parliament is finished.

\* 714

But great doubts having arisen upon the aforesaid statute, it shall be understood or meant by the said words, viz. \* the said parliament is finished; for explanation thereof, it enacted, by 6 Anne, Ch. 8. S. 1. that for ever thereafter privilege of parliament shall begin forty days before the opening or meeting of every parliament, and shall continue to the sitting or adjournment, and forty days after the prorogation or dissolution of every parliament.

Explanation of the words, in the above act, After the parliament is finished.

And

The reasons mentioned by the defendant's counsel were, that by the plaintiff referring for insufficiency, he had waived the prolixity and impertinence; that he might have first referred the answer for prolixity and impertinence, and would not thereby be precluded from referring it afterwards for insufficiency; for, that an answer may contain a great deal of prolixity and impertinence, and at the same time be extremely insufficient.

If a plaintiff could not refer an answer for insufficiency, after he had referred it for scandal or impertinence, as some have thought (for that by so doing it, he had admitted it to be an answer, though a scandalous or impertinent one, whereas an insufficient answer is as no answer) nor refer for impertinence, after he had referred it for insufficiency, there might in such case be a perfect failure of justice, and in the other, a defendant may pleasure, cause an unnecessary expence and trouble to a plaintiff.

## Privilege of Parliament.

Defendant in  
anter droit not  
privileged.

And by Sect. 6th, no peer, lord of parliament, or member of the house of commons, who shall be a trustee, guardian, executor, or administrator, shall have any benefit or privilege of parliament, in any suit which shall be prosecuted against them, as trustee, guardian, executor, or administrator, any court of law or equity, or in any ecclesiastical or other court.

\* 715  
Privilege limited  
to fourteen  
days.

\* By 1st Geo. 2d. Ch. 8, suits may be commenced and prosecuted in this court against any lord of parliament, or member of the house of commons, or against their or any of their menial or other servants, or any other person intitled to the privilege of parliament, at any time after fourteen days next following the dissolution or prorogation of any parliament until fourteen days immediately before a new parliament shall meet, or the same be re-assembled; and the said court may at any time after fourteen days next following such dissolution or prorogation, and until fourteen days before a new parliament shall meet, or the same be re-assembled, proceed to give judgment, and make final orders, decrees and sentences, and award execution thereupon \*.

For the person  
forty days.

\* 716

But the person of any member of the house of commons or other person intitled to privileges, is not to be arrested in the space of forty days before the beginning or meeting any parliament, or for forty days after prorogation or dissolution of this, or any other parliament.

But a person may exhibit his bill, and proceed on process to a sequestration and distress infinite.

The person privileged forty days.

And any person, having cause of suit or complaint, may in the times aforesaid, exhibit any bill or complaint, against any lord of parliament, or member, or other person intitled to the privilege of parliament, in the Chancery, or Exchequer, and may proceed by a letter or *subpoena*, as is usual; and upon leaving a copy of the bill with the defendant, or at his hotel or lodging, or last place of abode, may proceed thereupon, and for want of appearance, or answer, or for non-performance of any order, or decree, or for breach thereof, may sequester the real and personal estate of the party, as is used, where the defendant is a peer; but shall not arrest or imprison the body of any knight, citizen, or burgess, or other privileged person, during forty days immediately before the beginning meeting of any parliament, or during forty days immediately

If a copy of the bill be served at any time pending the suit, the plaintiff may proceed against a lord or commoner, at the

times mentioned in Stat. 1. Geo. 2d. Ch. 8.

\* So that if a copy of the bill be served on a lord, or commoner, plaintiff may, at the expiration of the fourteen days, mentioned in the statute, 1 Geo. 2d. Ch. 8, proceed in his cause, otherwise he cannot prosecute until after the expiration of the forty days, mentioned in the aforesaid statute 3d Edw. 4. Ch. 1. — But note, if the copy of the bill be served at any time pending the suit, it will entitle the plaintiff to proceed after the fourteen days are expired; and the copy of the bill is to be signed by attorney for the plaintiff.

## Privilege of Parliament.

after the prorogation or dissolution of this or any other parliament. See *Letters Missive*.

And where any plaintiff shall, by reason or occasion of privilege of parliament, be stayed or prevented from prosecuting any suit by him \* commenced, such plaintiff shall not be barred by any statute of limitation, nor nonsuited, dismissed, nor his suit discontinued, for want of prosecution of the suit by him begun, but shall from time to time, after fourteen days from the rising of the parliament, be at liberty to proceed to judgment and execution.

Suits not barred  
or discontinued  
by privilege of  
parliament.

\* 717

And by the said statute, no action, suit, process, order, judgment, decree, or proceeding in law, or equity, against the king's immediate debtor, for the recovery of any debt or duty, due unto his majesty, or against any accountant unto his majesty, his heirs, or successors, for any part of their revenues, or other immediate debt, or duty, or the execution of any such process, or proceedings, shall be impeached or delayed by privilege of parliament; yet, so that the persons of any such debtor, or accountant being a peer of this realm, or lord of parliament, shall not be liable to be arrested, or imprisoned upon any such suit, order, judgment, decree, process, or proceeding; or, being a member of the house of commons, shall not during the space of forty days before the beginning, or meeting of any parliament, or during the like space, after the prorogation, or dissolution of any parliament, be arrested, or imprisoned upon any such order, &c.

The king's  
debtor not pri-  
vileged, except  
his person, forty  
days.

\* By Stat. 11. Geo. 2. ch. 5. Sect. 1. It shall be lawful, during the continuance of the privilege of parliament, to file any original bill in any court of equity, or to sue out any original writ, without further proceeding on such bill, or writ, against any persons intitled to privilege of parliament.

\* 718  
Privilege of  
parliament not  
to prevent pro-  
ceedings in  
courts of equity.

By a Brit. Statute, 11 Geo. 2. Ch. 24. Sect. 1. Any person may commence and prosecute in Great-Britain, or Ireland, any suit in any court of record, or of equity, or of admiralty; and in all causes matrimonial and testamentary, in any court having cognizance, against any peer of Great Britain, or against any of the knights, citizens, and burgesses of the house of commons of Great-Britain, or against their menial or other servants, or any other person intitled to the privilege of the parliament of Great-Britain, immediately after the dissolution, or prorogation of any parliament, until a new parliament shall meet, or the same be re-assembled, and immediately after any adjournment of both houses, for above fourteen days, until both houses shall re-assemble.

Proceedings  
may be in  
Great-Britain  
or Ireland, a-  
gainst any peer  
of Great-Bri-  
tain, or mem-  
ber of the house  
of commons of  
Great-Britain,  
or others, inti-  
tled to the pri-  
vilege of the  
parliament of  
Great-Britain,  
immediately af-

ter dissolution, prorogation, or adjournment for above 14 days.

But

## Privilege of Parliament.

But the person  
of any member  
not to be arrest-  
ed during time  
of privilege.

And the four  
courts in Ire-  
land may, after  
such dissolution,  
&c. proceed  
and issue like  
process, as the  
same courts in  
England may  
by 12 and 13.  
Will. 3. ch. 13.

\* 719

But by Sect. 2. This act shall not subject the person of any of the house of commons, or any other person intitled to privilege of parliament, to be \* arrested during the time of privilege; nevertheless it shall be lawful for any of the courts of King's-Bench, Common-Pleas and Exchequer, in Ireland, after any dissolution, prorogation, or such adjournment as aforesaid, or before any session of parliament, or meeting of both houses, to use such proceeding and to issue the like process, against any such peer, or against any of the said knights, citizens, and burgesses, or other persons, intitled to the privilege of the parliament of Great-Britain, as the courts of King's-Bench, Common-Pleas, and Exchequer in England are, by 12 and 13th Will. 3. ch. 3, impowered to use: And it shall be lawful for the Chancery of Ireland, and the court of equity in the Exchequer there, to use such proceeding, and to issue the like process against the persons aforesaid, as the Chancery of Great-Britain, and the Exchequer in England, are by the said act impowered to use. And it shall be lawful for any of the other courts before described, the process whereof is not particularly directed by the said act, or by this act, after any dissolution, prorogation, or such adjournment as aforesaid, or before any session of parliament, or meeting of both houses, to issue like process against any such peer, or any of the said knights, citizens, or burgesses, or other persons intitled to the privilege of parliament, as \* such courts may now lawfully issue against persons not liable to be arrested.

\* 720

Where the  
prosecution of  
any suit is  
stayed, by pri-  
vilege of par-  
liament, it  
shall not preju-  
dice the plain-  
tiff, but he may proceed when privilege is out.

No privilege to  
bar the king's  
action, so that  
no member be  
arrested during  
his privilege.

And by Sect. 3, where any plaintiff shall by privilege of parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by any statute of limitation, or non-suited, dismissed, nor his suit discontinued for want of prosecution, but shall, upon the rising of the parliament, be at liberty to proceed to judgment and execution.

And by Sect. 4, no proceeding in law or equity, against the king's original and immediate debtor, for the recovery of any debt originally, and immediately due unto his majesty, or against any person liable to render account unto his majesty for any part of his revenues, or other original and immediate duty, shall be stayed in any court of Great Britain, or Ireland, by privilege of the parliament of Great Britain, yet so that the person of such debtor or accountant, being a peer of Great-Britain, shall not be liable to be arrested upon such suit, or being a member of the house of commons of Great Britain, shall not, during the continuance of the privilege of parliament, be arrested upon any such proceedings.

And

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## Privilege of Parliament.

\* 721

And by Sect. 5, this act shall not give jurisdiction to any court, to hold \* plea in any real or mixed action, in other manner than such court might have done before. See *Injunctions to prevent Waste*, and *Injunctions to stop Proceedings at Law*, under Title *Injunctions*.

A sequestration nisi, is the first process against a peer, or member of the house of commons; but if there be a sequestration nisi against a peer, for want of an answer, and the peer puts in an answer, which is insufficient, yet the order for a sequestration shall not be absolute, but a new sequestration nisi shall issue. 3 *Williams*, 395.

Sequestration against a peer for want of an answer, and he puts in an insufficient answer, new sequestration nisi, to issue.

First process against the menial servant of a peer is a sequestration nisi.

And see 1 *Williams*, 535, where it is determined to be both within the meaning and words of this last statute, that the first process of contempt against a menial servant of a peer of the realm, for want of an answer, is a sequestration nisi, in the same manner as in the case of the peer himself; and lord chancellor said if it were not so, as it is plain no attachment would lie against their persons, consequently there would be no remedy against them, and they would have a greater privilege than their lord, if the process against such menial servant were to be a *subpœna*. 1 *Williams*, Rep. 535.

Per Cur. Tho' the court will not proceed against a member that has \* privilege of parliament; yet if a parliament sues at law, and a bill is brought in equity to be relieved against that action, the court will make an order to stay proceedings at law, till answer, or further order. 1 *Vern*. 329. *Moseley's Rep.* 125.

The court will grant an injunction against a member of parliament, to stay his suit at law, till answer, or further order.

\* 722

Although the privilege of peerage doth allow a peer of the realm to put in his answer, upon honour only, yet it is restrained to an answer; and as to all affidavits, and where a peer is examined, as a witness on interrogatories, or *viva voce*, he must be upon his oath. 1 *Williams*, 147.

A peer is to answer upon honour, but his affidavit, or his examination as a witness, either *viva voce*, or upon interrogatories, must be upon oath.

The case is the same as to peeresses. Sed querit if peers, &c. have this privilege, when they are sued in *auter droit*, as executor, administrator, guardian, or trustee.

If a peeress, by marriage, is charged by the plaintiff's bill, to have afterwards intermarried with a commoner, and therefore required to answer upon oath, and that she apprehends the answering upon oath may be a prejudice to her, before she puts in her answer upon honour, she should apply to the court in a special manner, for liberty to do so, and the court will determine the question according to the nature and merits.

How a woman, who is a peeress by marriage, is to assert her privilege, if she be afterwards charged as married to a commoner.

## Privilege, &c.

\* 723

of the case; or else, she should plead her privilege; but in this case, \* it is thought, she must assert her first marriage to a peer, by which she had privilege, unless it be admitted by the bill, and deny her marriage to a commoner, to support the plea; for where persons so insist upon privilege, they must shew their privilege. See the case of lord *Howth* against lady *Howth* in Chancery, *Michaelmas* and *Hilary* terms, 1753, and 1754.

Ibidem.

And note, there is a difference as to peers and peeresses, in asserting their privileges; peers do it by matter of record, peeresses by matter in *pais*, or *parol* proof.

A peer who answers falsely, upon honour, cannot be indicted for perjury, and why.

If a peer of the realm answers falsely upon honour, he cannot be indicted for perjury on the statute 28th *Eliz. Ch. 1*, for the indictment must directly shew, that the defendant was sworn upon the Holy Evangelists, &c. *Hawk. 249*, but he may be indicted for a misdemeanor. See Letter *Misfr.*

## Privilege of the Officers, &c. and Suitors in the Court.

Attorneys and other officers privileged.

\* 724 And exempt from serving on juries, or in any office which may disturb them in their profession.

Privilege of attorneys extends not to their servants.

An attorney on the roll, tho' he doth not practice, hath privilege.

Sergeants at law or barristers have no privilege.

PRIVILEGE belongs to all the officers, attorneys, and ministers of the court; and if any person intitled to privilege, be arrested by process of any other \* court, he may bring his writ of privilege, containing a *superfedeas*: And all officers, attorneys, &c. intitled thereto, are exempt from serving upon juries, in offices, or in any capacity that may in the least disturb or molest them in their profession; but it is very necessary that such person, so intitled to privilege, should have a writ of privilege, ready to produce at all times, upon occasion.

But privilege extends only to such attorneys, &c. who have an immediate dependance on the court, and it does not extend to their servants or dependants.

But an attorney tho' he doth not practice, yet he shall have his privilege so long as he continues an attorney on record.

A sergeant at law has no privilege, nor a barrister.

## Privilege, &c.

An attorney, using any trade, shall be obliged either to leave off his trade, or be put out of the roll.

An officer of this court being arrested, produced his writ of privilege, which the bailiff refused, and obliged him to put in bail before he would discharge him. Lord Egerton \* committed the bailiff to the Fleet, for the contempt. 2 Har. Chanc. Pract. 3d Edit. 320.

An attorney using a trade, to be put out of the roll.

A bailiff committed for refusing to discharge an officer of the court, who had

produced his writ of privilege.

\* 725

Privilege is not to be pleaded in the negative; as that an officer ought not to be sued elsewhere but in his own court, without saying it is usual for them to be sued there, &c. and it should not be pleaded too general. 2 Har. Ch. Pract. 3d Edit. 320.

Privilege how to be pleaded.

The officers and attorneys, &c. of the court, have also this privilege, that they are not to be sued in any court, but in that court only to which they belong (except they be sued by an attorney, &c. of another court in his court) if they be, they may plead their privilege, and it shall be allowed. *Sed quer.* if there be another defendant in the cause not privileged. See 1 Vern. 246.

Attorneys, &c. to be sued in their own court only.

*Quer.* if there be another defendant not privileged.

The defendant being foreign apposer in the Exchequer, pleaded the privilege of that court, and that he ought not to be sued or impleaded elsewhere; but the court over-ruled the plea, because it was not put in upon oath. 2 Vern. 83.

Plea of privilege to be upon oath.

By the 79th general rule, attachments of privilege at the suit of officers, attorneys, or any other \* privileged person, grounded upon English bills, are not to issue until the bill be first filed.

RULE.  
Attachment of privilege not to issue till bill filed.

But if the bill be for an injunction to quiet possessions, stay wastes, or suits at law commenced, such attachment or other process for appearance may issue before the bill be filed; notwithstanding the above rule, how to proceed, if the bill be not filed in time, after such process hath issued, see the proceedings on the *subpœna*, under Title *Process*.

\* 726  
Except to quiet possessions, stay wastes, or suits at law.

Where an attorney is defendant to a bill, a *subpœna* is not to be prayed in the bill against him, but an order for him to answer the plaintiff's bill in the usual time, unless he is sued as executor, administrator, guardian, or trustee; for his privilege is personal, and not to be applied, but as he is an attorney of the court. See Title, *Attorney and Solicitor*.

*Subpœna* not to be prayed in a bill against an attorney, but an order to answer, unless sued in *anter droit*.

## *Process.*

Suitors and witnesses attending the court, if arrested, shall be discharged.

\* 727

All suitors and witnesses attending on the courts of justice are privileged; and if during that time they are arrested, either in the face of the court, or out of the court, as they are going or coming to attend and follow the causes, on which they so attend, (for so far the court does and will protect every man) the court, on application.\* of counsel, will enlarge them, and will grant a temporary *superfedeas* of privilege; and the plaintiff in the action, upon complaint and oath made thereof, shall, unless he makes it appear, he was ignorant of the attendance the defendant was bound to, stand committed, and remain in custody, until he petitions, submits and begs pardon of the court, and pays the costs to the other party. *2 Litt. 371. Golds. 33. Bulst. 85. 1 Har. Chanc. Pract. 3d Edit. 319.* But in such cases, the best way is to apply to the court for a writ of protection, for some certain time, which the court will grant on a proper affidavit, and on counsel's motion; and when it has issued, it will be proper to shew the same, and give copies thereof to all sheriffs, &c. to whom it is likely any process may be directed against the party. See my *Practice of the Law Side of the Court*, p. 18.

Writ of protection.

Defendant arrested, in coming up to execute a commission, and being arrested, had an *habeas corpus cum causa*, and was set at liberty. *1 Ch. Pract. 3d Edit. 319.*

And also a plaintiff who had come up to examine his witnesses. Quær.

\* 728

A defendant, coming to execute a commission, and being arrested, had an *habeas corpus cum causa*, and was set at liberty. *1 Ch. Pract. 3d Edit. 319.*

Process what.

PROCESS (*Processus a procedendo ab initio usque ad finem*) is so called, because it proceeds or goes out upon some matter, either original or judicial, and hath two significations. First, it is (largely) taken for all the proceedings in any action, real or personal, civil or criminal, from the beginning to the end. Secondly, we call that process, by which

## *Process.*

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*Proces.*

a man is called into any temporal court, because it is the beginning or principal part thereof, by which the rest is directed; or if taken strictly, it is the proceeding after the original before judgment. *Briton*, 138. *Lamb. Lib.* 4. Cr. 133. 8 *Report* 157.

The *subpœna* is the first proces of this court, in order to bring in the party to answer: And it is the only writ on this side of the court, which the attorneys themselves make out, but no other writ in this court; and it issues under the seal of this court, requiring the person complained of in the bill, sometimes immediately, and at other times at a certain day, to appear in the said court, on pain of 100l. to answer the matters objected against him, by the person complaining of him in the bill, who is generally called plaintiff.

Subpoenatherist,  
Process, to call  
the defendant  
in to answer,  
and is made out  
by the attorney.

\* 729

It was anciently and originally a proces in the courts of common law, in order to bring in a witness to attest the truth; and it is a summons to the party, under a penalty, to appear and give his testimony.

Originally a  
proces at com-  
mon law to  
bring a witness  
to attest the  
truth.

This process therefore was taken up by the court of *Chancery*, when a man was convened to answer upon oath as to the truth of the plaintiff's allegations; because it was the nearest proces that was used in the case of attestation by the common law; and this was formed after the manner of citations by the civil and canon law, in which it was necessary to insert the name of the defendant, and also of the plaintiff, at whose suit they were to appear, and the time and place for appearance.

And was formed  
by the court of  
*Chancery*, after  
the manner of  
citations, at the  
civil and canon  
law.

And this writ in *Chancery* was first framed by *John de Waltham*, keeper of the *Rolls*, and afterwards bishop of *Salisbury*, and lord treasurer of *England*: It took its name from the words inserted therein, to denote the penalty for non-performance, viz. *sub pœna centum librarum*; which words are inserted in *terrem*, the penalty being never levied.

Subpœna, why  
so called, and  
when first  
framed.

\* 730

And it is common to, and prayed by all the before-mentioned bills, and is made use of on every one of them, but on the *possessory bill*; which bill is proceeded upon on the appearance on service of the injunction, and on personal interrogatories, as is before set forth.

Common to,  
and prayed on  
all bills, except  
*possessory bills*.

You can put but four defendants in one *subpœna*, and the reason is to prevent the vexations of plaintiffs, and to prevent the mistakes which might happen in the transcribing a multiplicity of names; but a husband and wife are taken together out as one of the four.

Four defendants  
only to be in a  
*subpœna*.

By

## Process.

**RULE.**  
How to be tested  
and made re-  
turnable.

The return of  
the subpoena  
two-fold.

1st, ordinary,  
which is return-  
able at any day  
certain in term.

\* 731  
2dly, extraordi-  
nary, which is  
returnable im-  
mediate.

Subpoena tested  
on a dies non,  
held good.

By the 3d general rule, every *subpoena* is to be tested, and made returnable in term-time, or in the four days after *Easter* term, or in the eight days after every other term.

And the return of the *subpoena* is either ordinary, or extraordinary.

1st, Ordinary, which is at any day certain within the term; for in this court, by the foregoing rule, no *subpoena* is to be returnable in the vacation.

\* 2dly, The Extraordinary return is made *immediate*; but in this case the *subpoena* must issue in term-time, or in the four days after *Easter* term, or the eight days after any other term; and no service of such *subpoena* returnable *immediate*, shall be good, unless it be in *Dublin*, or within twelve miles thereof. See p. 734. And note, the defendant has the same time to appear to a *subpoena* returnable immediately, as to the *subpoena* returnable on a certain day,—that is, four days after service.

In the case of *McCarthy* and *Kelly*, in this court, a *subpoena* was tested on a *dies non*, and solemnly determined by lord chief baron *Dalton*, that it was regular to do so; and he was of opinion, that a *subpoena* may be tested and made returnable at any time in term, or in the four or eight days after any term.

**RULE.**  
To be signed by  
the attorney,  
and entered  
at the chief re-  
membrancer's office,  
and at the seal office,

What mistakes  
in the writ will  
viti ate the writ.

\* 732  
1st, In the  
names of the  
parties.

By the 6th general rule, all *subpoenas* are to be signed by the attorneys, and entered at the chief remembrancer's office, and at the seal, otherwise, upon certificate of no such signing, or entry, the defendant to be dismissed with costs.

And note, that there may be several mistakes in the *subpoena*, which may vitiate the writ.

\* First, in the names of the parties; for if there be error in the name, either christian name or surname, there, if another person, so named, be served, he shall have his costs. And, that this was so at the canon law, see *Gail*, 93; *Durand*, 177.—But if the person falsely named be served, and do not appear, there can be no process of contempt against him; because no person was cited; *et non entis nullæ sint qualitates*; and therefore, if an attachment issues upon such *subpoena*, upon application to the court, it shall be discharged with costs.—So also, at the canon law, if the person so served appeared, and went away without answering, there could be no process against him, because the citation is the foundation of the cause, and the libel a specification of the citation, and the process must run upon the citation, and a citation against *Peter* could found no contempt or contumacy against *John*: But in cours of equity

### *Process.*

equity, where the *subpoena* is but as a summons, if the defendant appears by his proper name, and that he be properly named in the bill, this cures any error in the *subpoena*, or the service thereof; and process may be entered upon this appearance, for want of an answer, though he was improperly named in the *subpoena*. *Maranta*, 240.

\* Secondly, in the return, as if it be taken out in term returnable at no day, or time certain; for the party is at a loss when to appear, and, therefore, there is no contempt in not obeying it. \* 733

Thirdly, in the form of the writ; for if the form of the writ be mistaken, it cannot be presumed, even in the court to which it is returnable, that it issued from thence; and therefore, the party served, shall not be obliged to take notice of it.

But where there are many plaintiffs, they need not all be named, but only *A. B.* and others, since this is sufficient notice to the defendant to appear; for the appearance to *A. B.* and others, will be an appearance to the rest; but the safest way is to name all the plaintiffs.

By the 7th general rule \*, if the bill be not filed before or at the day of the return of the *subpæna* to answer, then the defendant may enter his appearance; and upon producing (at least \* four days after such appearance) a certificate thereof, and of no bill being filed, he shall, upon motion, be dismissed with costs; but if no such motion be made, then the plaintiff shall have liberty to file his bill at any time in the said term, or within ten days after the said term; but if the bill be not filed in that time, no process of contempt to issue on the said service.

So that if the bill be not filed within the time prescribed by the rule, after service of the *subpæna*, no process of contempt shall issue on such service, but the plaintiff must serve the defendant a-new with process for appearance; and notwithstanding the *subpæna* be served before the bill be filed, yet the defendant is not obliged to appear until the bill be filed, and after it is filed, he shall have the usual time to appear and answer, as in cases of *subpæna*, served after the bill is filed.

By the 5th general rule, as to *subpoena* returnable immediately, if the plaintiff does not file his bill, within four days after appearance, then, upon motion to be dismissed, without *subpoena*, returnable immediately, and such *subpoena* to be served in Dublin.

30W

\* This rule relates only to bills for injunctions to quiet possessions, stay waste, or suits at law; in all other cases, the bill must be filed before the subpoena issues, by statute 6 Ann. Cb. 10. Post.

*Process.*

Any further day; and no service of *subpoena* returnable immediately shall be good, unless it be in *Dublin*, or within twelve miles thereof.

\* 735  
Time for filing  
the bill en-  
larged, on spe-  
cial cause shewn.

The court do sometimes, on motion of the plaintiff's attorney, enlarge the time for filing the bill; but as these bills are often contrived merely to delay some proceedings at law, the court is very unwilling to grant further time, unless some special cause be shewn.

No subpoena to issue till bill filed, except in cases of bills for injunctions. Nor until a certificate that the bill is filed.

But now, by statute 6th *Ann.*, Ch. 10. pars., no *subpoena*, or other process for appearance, shall issue out of any court of equity, until after the bill is filed with the proper officer, (except in cases of bills for injunctions, to quiet possession, to stay waste, or suits at law, commenced)\* and a certificate thereof, brought to the proper officer, who makes out *subpoena*, or other process, under the hand of the officer who files bills in equity; for which certificate he shall have no fee.

The certificate  
indorsed on the  
subpoena.

In this court, the officer who files the bill, enters on the back of the *subpoena*, that the bill is filed.

Time of filing  
bill, to be mark-  
ed on the sub-  
poena, if above a  
year before.

If the bill be filed above a year before the *subpoena* issues, the officer is to mark, at the foot of the *subpoena*, the \* time the bill was filed, for the ease of the defendant in finding the same.

\* 736  
They only  
are defendants  
against whom  
process is prayed.

They only are defendants to a bill, against whom process is prayed. *1 Williams*, 598.

RULE.  
*Subpoena* how  
to be served in  
all cases.  
How if it be for  
payment of  
money; and  
the defendant  
out of the king-  
dom.

By the 1st general rule, every *subpoena* is to be served personally, or a copy thereof (after shewing the said writ) left at the defendant's usual place of residence, with one of the family, to be given to the defendant, unless it be for payment of money, in which case, personal service is requisite. But where the defendant is out of the land, and cannot be found, and yet prosecutes a suit at law, or in this court; for relief against which suit at law, a bill is exhibited, upon affidavit made that he is out of the land, and cannot be found, the court will order the *subpoena* to be left with his attorney at law, or in this court, as the case requires, and that to be good service.

Defendant to be  
served with a  
true copy, or  
no contempt not  
to appear.

But note, it must be a true copy with which the defendant is served, or he may take advantage of it, for it is no contempt in the party, not to appear, if he be not served with the *subpoena* itself, or a true copy.

\* A *subpoena* for an injunction to stop proceedings at law, may issue notwithstanding there be not any suit at law commenced, at the time the *subpoena* issued, as to stop an execution, &c.

## Process.

In lord chief baron Hale's time, it was ordered, that the Persons employed in serving *subpœnas*, and other \* processes, should be literate persons, and capable of reading the process they served.

\* 737

In the case of *Higginbotham* against *Cheevors* in this court, the Service of the service of a *subpœna* on a return day, even in the afternoon, *subpœna* on the was ruled by lord chief baron Gilbert, good, because it is not return day good. certain how long the court sits.

If the defendant be but an inmate or lodger in a house, How the subpœna is to be served if the defendant be but a lodger in the house.  
the *subpœna* is to be served either personally anywhere, or upon the defendant's own servant, or his wife, or child, above the age of sixteen years, at the lodgings, or upon the landlord or landlady of the house; but service upon the servant of the landlord or landlady, will not be good.

But leaving a *subpœna* to appear and answer, at the lodgings of a defendant, who was not to be found, not good service, though an order was obtained for that purpose, it appearing afterwards that the defendant had left his lodgings above a year before the *subpœna* was served. 2 *Vern.* 369.

Process served at defendant's last place of abode, defendant having left it above twelve months, not good.

A service on either husband or wife, a good service of both.

\* 738

If the *subpœna* be against husband and wife, and either the husband or wife alone be served, it is good service of the other, because they are considered as the same person, and their property is the same; and therefore if one only be served, it is presumed to be sufficient notice to the other; and, for want of an appearance for the wife, an attachment will issue against the wife, or both, in as much as it is a contempt in both, if the wife doth not appear as well as the husband, since the husband ought to take care to order an appearance for his wife.

If two persons commence a suit beyond sea, to arrest the defendant's goods at Leghorn, by order of court, the service of the *subpœna*, on the defendant here, may be service on the other defendant beyond sea. *Love and Baker.* 1 *Ch. Ca.* 67; for both joining in the suit beyond sea, are looked on, in the cause, as but one person; and, by consequence, they are to be looked on here but as one person, they being in this matter the same in interest.

The service is good in the night, or on Sunday, if it be before the time of the return; for this being only process of notice, and not to arrest the party, it can create no disturbance, though it be served in the night, or on Sunday. 1 *Har. Chancery Pract.* 299. 3d Edit.

When the service is good at night, or on a Sunday.

If a man, whose place of residence is in the country, be found in town, and there, be served with a *subpœna*, he is only found in town, and served with a *subpœna*, he has only the usual time to answer, unless on special cause shewn.

A person who resides in the country, is entitled

\* 739

intitled to such time to answer as a \* person who resides in town is, and not intitled to a *de dimis* to answer in the country; nor will the court grant it, unles upon some special cause by affidavit, because the time for answering depends upon the place where the *subpæna* was served; for no man can gain, to himself, a new privilege, by his change of habitation, after the *subpæna* served

**RULE.**  
Service of defendant's attorney at law, or in this court with subpæna, good service, where defendant is out of kingdom, and he is also to be served with the order.

By the 11th general rule, where a bill is brought to be relieved against a suit at law, upon affidavit filed, that the defendant is absent beyond seas, an order may be taken out of course, for allowing the service of the attorney at law, or in this court, to be good service; and the attorney is to be served with the order: In which case, he shall have, for his client, four days to appear, and four days to answer, before any process of contempt do issue.

If the defendant be a necessary party, and is out of the kingdom, or absconds to avoid service, the court will go great lengths to compel the defendant to appear.

Where it has appeared to the court, that the defendant was a necessary party, and that he was in foreign parts, or out of the kingdom, and absconded, so that it was very difficult, or almost impossible to have him served with process, the court have, in many cases, gone great lengths to compel the defendant to appear for the expedition of justice. See *1 Williams*, 523.

\* 740 Service of defendant's wife's house, or place of abode ordered as good service.

\* In the case of *Cord* against *Brown*, and others, in this court, 28th April 1730, it was ordered, that service of one of the defendant's wife's house, or place of abode, with *subpæna* to answer, and other process, should be good service of the husband, it appearing, by affidavit, that he was out of the kingdom, and a necessary party, and that his wife absconded to avoid service.

Service on a person, who had a bond of the defendant in his hands.

And in the case of *Humphry* against *Newstead*, and others, 9th May 1730, it was ordered, that service of *James Fleming*, who had a bond in his hands belonging to the defendant *William Newstead*, and was to receive the money for him, and of *Charleton and Scot*, two attorneys, with a *subpæna* to answer, should be deemed good service of the defendants, *Thomas* and *William Newstead*, they being out of the kingdom and absconding; it appearing that the said *Charleton and Scot* were attorneys for the said *Thomas* and *William Newstead* in other causes commenced against them; the said *Fleming, Charleton, and Scot*, being served with notice of the motion, as appeared by affidavit.

Where a plaintiff by his own bill, or by affidavit appears to be beyond seas,

If it be necessary to bring a cross bill against a plaintiff, who upon the face of his own bill, appears to live abroad, beyond seas,

*Process.*

\* 741

as, the service of his attorney, in court, with a *subpoena*, shall be \* ordered to be good service, without the usual affidavit; because, it appears, by his own bill, that he is out of the reach of the process of the court: And where it does not appear, by the plaintiff's bill, that he is beyond seas, on affidavit hereof, the like order shall be made.

No process can be served on a prisoner, committed at the suit of the crown, without leave, but if he once appears, you may go on against him. See *Moseley's Rep.* 237, where it is said, that lord chancellor, as one of the commissioners ofoyer and terminer, gave leave to serve a person with a *subpoena*, who was in confinement in *Newgate* for murder, of which he was indicted at the *Old Bailey*, and a special verdict found.

No process to be served on a prisoner committed at the suit of the crown, without leave.

Where an attorney is defendant to a bill, a *subpoena* is not to be prayed in the bill against him, but an order for him to answer the plaintiff's bill in the usual time, unless he is sued as executor, administrator, guardian, or trustee.

Proceedings against attorneys on filing bills against them.

The king's attorney general is not to be served with *subpoena*, upon any bill being filed against him. See *Title Bill*.

The attorney general not to be served with subpoena.

\* *Subpoenas* may be as well served within liberties, as without.

\* 742  
Subpoenas may be served within a liberty.

If injury be done to the party, who serves the process, either in word, or deed, or the authority of the court contemned, upon affidavit, and on counsel's motion thereon, an attachment to the purviant shall issue against the party guilty of the contempt, for it is against the dignity of the court to suffer such contempt; and the rather, because the process is executed by private persons, and not by a public officer; for no private man would serve the process, if it were not to be vindicated, for obloquy, abuse, or contempt.

On affidavit of an injury done to the party serving the process, and on motion, the court will commit the party offending.

By 7 Geo. 2. Ch. 14, it is enacted, that upon all bills of foreclosure filed, or to be filed, in the courts of *Chancery*, or *Exchequer*, where it shall appear to the court, by affidavit, that any of the parties, necessary to be served, for carrying on the suit, do abscond, or are out of the kingdom, so as they cannot be served with process, to appear and answer, but have been in the kingdom within twelve kalendar months next preceding such affidavit, the courts may order that service of the tenants of the mortgaged premisses, or the known agent, or receiver of the rents and profits, and at the last place of abode \* of the person so absconding, or being out of the kingdom, shall be good service.

Process on bills for foreclosure of mortgages, how to be served on persons absconding or out of the kingdom.

\* 743

And

Ibidem.

And note, the motion in this case, is to be made by the plaintiff's attorney; and the court do not require a certificate of the bill being filed, as it is usually so set forth in the affidavit on which the application is founded.

### *Subpœna to elect an Attorney.*

Subpœna ad faciendum attorney where a cause has slept twelve months.

The reason of it.

If a cause hath slept twelve months in court, there shall be no proceedings had upon it, without first serving a subpœna ad faciendum attorney. 1 Vern. 172.

And the reason of the *subpœna ad faciendum attorney* in this case, is, because the defendant might be dead in so long a time, and therefore, the court do not think the first appearance of the defendant, by his attorney, to be sufficient to found any further acts or proceedings of the court upon; and therefore, there must be a second appearance for the defendant, and then it is presumed that he is living.

\* 744  
And where the defendant's attorney is dead, &c. must issue.

\* Also, if the party's attorney in court be dead, no process can be taken out against the party, until he has appointed a new attorney in court; and a *subpœna ad faciendum attorney* must be taken out for that purpose, and served; because, till then, the party is not in court. 1 Williams, 420, Ratliff against Raper.

RULE.  
The proceedings thereon, where the defendant's attorney is living, and when he is dead.  
On an appearance, the plaintiff may proceed of course.  
Service of this writ good, if left at the defendant's house.

But a rule was made in this court, the 27th June, 1709, that in all cases, where a party is served with a *subpœna ad faciendum attorney*, and the former attorney is living, there the rule is for liberty to proceed, upon producing an affidavit of the service of the *subpœna ad faciendum attorney*; but in case the attorney is dead, then the plaintiff is to prosecute the defendant to enforce him to make an attorney in the cause; and when the defendant has appeared, you may proceed of course, without any motion or rule for liberty to proceed.

It was allowed, that the service of the *subpœna ad faciendum attorney*, would be good, if left at the house; and though the party in this case, denied himself, yet still the *subpœna* might be left at his house. 1 Williams, 420.

## \* Subpæna to hear Judgment.

\* 745

WHEN a day is appointed by the court for hearing of Subpæna to hear the cause, the party, at whose instance the cause is set judgment down, may then issue a *subpæna ad audiendum judicium*.

By the 65th general rule, every *subpæna*, to hear judgment, is to be served personally, or left \* at the party's usual place of residence, eight days at least before the return thereof, except by the consent of the attorneys on both sides, a shorter time be agreed upon, or appointed by special order of court. And where it shall appear by affidavit, that the party to be served, hath no place of residence, or is beyond the seas, then the *subpæna* left with his attorney in court will be good service. †

RULE.  
How to be  
served.

It is necessary to have an affidavit of the service of the *subpæna*, to hear judgment made and filed, and to have an \* attested copy thereof ready to produce at the hearing, so that service may be proved, if the party served should not appear; if this affidavit be not filed, the court may refuse to give judgment.

An affidavit of  
the service  
thereof, to be  
produced on the  
hearing.

\* 746

And this citation is made according to the notion of the civil law, that no act of the court may be made *parte inaudita altera*; and the service is made eight days before the hearing; that the party may have time to take out his depositions and prepare his counsel.

And this sub-  
pæna is accord-  
ing to the no-  
tion of the civil  
law.

And it is to be served upon all hearings, except upon hearings upon the officer's report, and the merits, where an account has been decreed; or upon the verdict and merits, where an issue has been directed to be tried at law, or upon re-hearing, or hearings upon bills of review and reversal; or upon sequestrations, where the bill is to be taken as confessed; in these cases it is sufficient to serve the order for hearing.

In what cases  
it need not be  
served.

Where an infant is defendant, the affidavit of service of the *subpæna* to hear judgment must be, that the guardian was served, not the infant; and this, (as it seems) though the infant be above fourteen, or want ever so little of twenty-one; and the serving the infant \* is not good, for *non constat*, but the infant might be in his cradle; or should it appear, by the bill, that he is near twenty-one, yet being not able to defend himself,

Where an in-  
fant is defend-  
ant, the affidavit  
of service of sub-  
pæna to hear  
judgment must  
be on the guar-  
dian, not on  
the infant.

\* 747

\* It would seem from the words of this part of the rule, as if the original was to be left at the place of residence. But this *subpæna* is served by delivering the copy in the same manner with the *subpæna* to appear and answer.

† But there must be an order for this purpose, which the court on such affidavit, and an attorney's motion thereon will make.

## *Process.*

self, the service must be on the person, appointed by the court, to defend him. *2 Williams*, 643.

Cause adjourned  
for want of par-  
ties, defendant  
must be served  
with subpoena  
to hear judg-  
ment.

If a cause is adjourned over, for want of parties, and the defendant is served with the order, yet he must be served with a *subpæna to hear judgment*. *Moseley's Rep.* 226.

## *Process of Contempt.*

Process of con-  
tempt upon the  
ordinary and  
extraordinary  
rules.

PROCESS of contempt issue, either by virtue of the ordinary stated rules, or by virtue of some extraordinary rule founded upon the parties consent, on obtaining some favour from the court.

As to the first, they are either for not appearing, for not answering, or not answering over, or for not taking out a *dedimus*, or not returning an answer in due time, after the return of the *dedimus*.

\* 748

As to the second sort of process. Under this head it is proper to consider the nature and extent of the rules for time to answer, or process *tunc pro nunc*, as \* also the rules for answering, or process from the beginning.

To consider also, where a plaintiff shall begin his process, and how far he shall proceed with them on the foot of these rules, and when he must go on in the ordinary course.

To consider also in what sense, and for what purpose, a short answer is to be looked upon as no answer with regard to process.

As to the rule of process, *tunc pro nunc*.

Process *tunc*  
*pro nunc*, the  
meaning there-  
of.

The meaning of that is, the defendant being obliged to answer by the stated rule in four days after appearance, his counsel or attorney prays, that that rule may be dispensed with, or relaxed, and that he may have further time to answer, and offers to the court, as an inducement, that in case he should fail to answer by the time that shall be given him, that the plaintiff shall be as forward with his process, as if no such rule had been obtained by the defendant, to prevent the plaintiff from proceeding with his attachments, according to the stated rules; that is, that the plaintiff shall be in as good a condition, as he would have been, if no indulgence had been given to the defendant.

## Process.

\* As to the rule of process from the beginning; by the former rule it was intended, that the plaintiff should be in as good condition as he would have been in, had the defendant not been indulged; but when the rule for process from the beginning is granted, it is intended he shall be in a better condition, and that will be done thus:

\* 749

Process from  
the beginning  
in two cases.

Suppose the defendant's time for answering, hath been long out, and the plaintiff hath neglected, or omitted to enter his process.

First, where defendant's time for answering is long out, and plaintiff omits entering process.

Or suppose the defendant hath answered short several times.

Secondly, where defendant answers short several times.

In either case, how plaintiff is to enter and test the process.

Now, upon this rule, if the defendant fails to answer, the plaintiff shall enter his process back, and take out, at once, all his process, not from the time of the rule given, but from the time the defendant should have first answered.

And it is proper to be considered, where the plaintiff shall begin his process, and how far he shall carry them on.

As to the question, where he shall begin, when the rule is, to give process from the beginning.

\* He shall test his process, where defendant made the first default, as is before mentioned.

\* 750  
Ibidem.

As to the rule for process *tunc pro nunc*, it must be considered what state the defendant was in, when this rule was obtained.

Process *tunc pro nunc*, how to be considered.

If his time for answering was out, then the plaintiff may test his process on the day of the rule.

If defendant's time for answering be out.

If his time for answering was not out, then the process must not be tested, till the attachment would have been due by the ordinary rules; for it is only intended by the rule for process *tunc pro nunc*, that he should be in as good a condition as he would have been in, and not in a better.

Now as to how far he shall proceed, on the foot of the extraordinary rules, and then go on, on the ordinary rules.

It is frequent for plaintiffs after the time given by the extraordinary rule is out, to let another term, or a part of a term pass, and then they have taken out process, not only to the time that was given, but to the time that lapsed afterwards,

\* 751

to the day of entering their proces; but that hath been judged \* irregular, and that for this plain reason, the proces cannot be taken out *per saltum*, and all at once, but by virtue of the consent or extraordinary rule; and the consent is only, that the plaintiff shall *tunc*, that is, when the time fixed for answering shall be out, take out proces; but what proces only such as would have been due in the ordinary course, if no such order had been, and then he ought to have gone in the ordinary manner, for the consent imports no more, nor can it be extended further.

Time given to answer, and defendant answers short, proces may issue, as if no answer.

As to short answers, if time is given or proces, and the defendant answers short, it is deemed as no answer, and therefore the proces may issue as if no answer was filed.

On report of an insufficient answer, plaintiff to go on with proces. Unless he hath accepted the cost.

It often happens, that a defendant in contempt, is at liberty to pay his cost, and hath leave to answer, and if he should answer short, the plaintiff may proceed with his proces, from the former proces, as if the answer had not been put in, and not be obliged to begin *de novo*, unless he hath accepted of the cost, which lord chief baron *Gilbert* called a communication, and the following case seems to confirm our practice.

Ibidem.

\* 752

A distinction was taken by the solicitor general, and agreed to by the court as reasonable, and agreeable to \* the meaning and orders of the court; that if any proces of contempt have gone out against a defendant, for want of his answer, that tender of the costs of those contempts, if the plaintiff accept them, and the answer upon looking into it appears to be insufficient, so that the plaintiff takes exceptions, and the defendant is obliged to put in a further answer, that in order to compel the defendant to put in such further answer (if not put in time) the plaintiff must begin all proces *de novo*, and go on with it regularly; because his acceptance of the costs, was a remission of all former contempts, and purged them; but as an insufficient answer is really no answer at all in the judgment of the court, if he refuses to accept the costs, and the answer being put in, and exceptions taken to it, if it is reported insufficient, he may go on with the proces where he left off, to compel putting in a further answer, without beginning *de novo*, as in the other case. *Haißwell* and *Grainger*, Ch. Ca. 238. *Bac. Equ. Ca.* 351, 352. *2 Williams, Rep.* 482.

Note, here it is proper to consider, how far he shall go on, will the time taken up in exceptions, and referring them and confirming the report be considered?

At

By  
on  
of the  
appeal  
Vo

\* And the usual process of contempt are as follows,

\* 753

1st *Attachment.*

2d *Alias Attachment.*

3d *Pluries Attachment.*

4th *Proclamation.*

5th *Commission of Rebellion.*

6th *Serjeant at Arms.*

7th *Sequestration.*

The *subpoena* is a summons to the party himself, that is defendant, wherefore, not to appear thereon, is accounted a contempt of the court; and in such case an attachment issues to the sheriff to take him up: In this, the *Chancery* or equity process differs from the process at common law, for there, the writ or common capias, which is in the nature of a summons, is directed to the sheriff, and the sheriff anciently made his return upon it, either *summoneri feti*, or *nihil habuit in ballata nisi per quod, summoneri possit*: here the plaintiff makes affidavit of the service of the *subpoena*, and files it in the proper office, and then the attachment issues of course, because the summons is in nature of an order to attend the extraordinary jurisdiction, and all other process issue \* on a supposition of disobedience thereunto; but if the summons had issued to the sheriff, it had only been a contempt shewn to a ministerial officer in not paying obedience to him, and not to the court itself: Besides, at common law, if a writ were directed to the party himself, that might have been smothered, and it would not have laid any foundation for any other court to proceed upon it: But when the power of the justiciar was broke, this gave the *Chancery* a power to issue writs, and the other courts authority to proceed upon them, and therefore these were necessarily directed to the sheriff, that they might be returned to the other courts; but in the *Chancery* and *Exchequer*, where the same court issued the process, where the appearance was to be, the first process was directed to the party, that it might be left with him, or at least a copy of it, to make the party more ascertained of the time of his appearance. *M. S. Treatise of the Original of the Court of Chancery*, by the late lord chief baron Gilbert.

1st attachment,  
and on what  
grounded.

\* 754

By the 9th general rule, no attachment for not appearing on *subpoena* is to issue out, but on affidavit first made and filed, of the service of such *subpoena*; and if the defendant doth not appear in four sitting days after the bill filed, and return of the

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K

*subpoena*,

**RULE.**  
Attachment for  
not appearing,  
or for not an-  
swering.

\* 755

*Subpoena*, and \* answer within four sitting days, after such appearance, then, upon failure of either, and not before, the attachment to issue.

Attachment  
may be directed  
to the sheriff of  
any county.

And in this court, although the defendant's place of abode be particularly mentioned in the affidavit, of the service of the *subpoena*, yet the process may be directed to the sheriff of any county; but in all cases, the place where the *subpoena* was served, should be particularly mentioned in the affidavit of service.

The usual re-  
turn on the at-  
tachment, by  
the sheriff.

And upon this attachment there are two returns, either a *cepi corpus*, or a *non est inventus*; but the first return is seldom or never made, the sheriff generally returning thereon, that the defendant is not found in his bailiwick; but as the process may be directed to any county, the clerk who makes them out, is usually empowered, by the sheriff of some county, to return them.

The form of  
the attachment,  
and how the  
sheriff is to dis-  
pose of his pri-  
soner.

\* 756

But in an attachment, the form of the writ is, *ita quod habas corpus ad respondentum nobis tam de quodam, contemptu per prefatus H: nobis illatum ut dicitur, quam super hijs que sibi tunc & ibi abdientur, et ad faciendum et ulterius recipiendum quod dicta curia nostra consideraverit in hac parte et hoc nullatenus omittas, et habas ibi hoc breve;* by which words it might seem they might \* amerce the sheriff for not bringing in the body, as they did upon the *capias* at common law; but because the writ was originally founded upon a contempt, it seems that when the sheriff has taken up the body, he has paid obedience to the writ, though he does not actually bring him up to the court; because, the contempt only induces a commitment, which is satisfied, by imprisonment in the county gaol; and the statute of *Westminster* ad only relates to original and judicial writs, and not to these prerogative process, and therefore they issued an *habeas corpus*, which is an undoubted writ, within the statute upon which to found an amerciament. *M. S. Treatise of the Original of the Court of Chancery*, by the late lord chief baron *Gilbert*.

If the sheriff  
returns a *cepi*,  
*a hab. corp.*  
is to issue.

So that if the sheriff returns a *cepi corpus*, the next step is to move for a *habeas corpus*, to bring up the defendant's body, if he will not answer below; for the sheriff has executed the command of the writ of attachment, by taking the body, and he cannot carry him out of the county, without the command of the king; and if he should carry him out of the county without the king's writ, it would be an escape. *Ibidem*.

The running  
out of process  
to a sequestra-  
tion, on the re-  
turn of *non est*  
*inventus*.

\* 757

If the sheriff returns a *non est inventus* on the first attachment (which is \* generally the case) and the defendant still stands out, the plaintiff may then issue an *alias* attachment, and upon the like return on the *alias* attachment, a *pluries* may issue, and upon the like return on the *pluries* attachment, the plaintiff

may then issue a proclamation, having first obtained an order of the court for that purpose, which is entered of course in the office, at the instance of the plaintiff's attorney.

And note, the writ of proclamation is a process, issuing out of the extraordinary jurisdiction, upon a *non est inventus*, returned on the preceding process, commanding the party to appear in the Chancery, *Subpæna ligēācīa*. Now where a *non est inventus* was returned on a *capias*, issued in a criminal matter, they proclaimed the party, and if he did not come in on such proclamation, he was declared an outlaw, so if he contemned the extraordinary jurisdiction he was proclaimed; or if he was not taken, or did not come in upon such proclamation, then he was deemed a rebel, and thereupon a commission of rebellion issued. *Ibidem*, and *vide Dalton*, 379, 380.

The proclama-  
tion a proces-  
sing out of  
the extraordi-  
nary jurisdic-  
tion.

It hath been doubted, whether upon an attachment, or proclamation, the sheriff may break the doors or not; some have held that the intent of the \* writ is to go no further than a common *capias*, and that according to the authority of *Semaine's case*, 5 Coke 91, it would be very inconvenient that the sheriff's officers, that execute common process, should have, by this writ, an authority to break into a man's house, and that his house should not be a protection to him; others have held that the writ is *propter contemptum nobis illatum*, and that therefore, being in the queen's case, there is no privilege or protection against the queen's process; but the true reason of this doubt, both in *Dalton* and *Compton*, arises from the not understanding the true nature of the process, and the true reason of *Semaine's case*, for doubtless upon an attachment, or proclamation, the sheriff cannot break the doors; and the difference as to this matter is, that when there is only authority in a process to take the person, or levy the debt, the sheriff can go no further, because the writ gives him no further authority; but in the queen's case, or in the case of outlawry, there are the words *non omittas propter libertatem aliquam*, and therefore such writ gives authority to break the house; besides, that in the case of outlawry, no man shall receive protection from the law, of which he is declared a violator, and therefore the seizing him as an outlaw, doth imply the liberty of entering and seizing him wheresoever he \* lay hid; but it may be asked why in the common case of a contempt, the process was not so formed as to give authority to sheriffs to enter the freehold; the reason is,

The sheriff upon  
attachment, or  
proclamation,  
cannot break  
open doors, and  
why.

\* 758

The difference  
between proces-  
ses issued for con-  
tempt, between  
party and party,  
and those at the  
suit of the  
queen, or out-  
lawry.

\* 759

First, because the very notion of *liberum tenementum* is, that the tenement should be freed by the law, from all actual violence, for that cannot be said to be held freely, if the lord that had right to distrain, or the sheriff that was to serve the ordinary process, had a power to enter by force, and if the lord was not permitted to enter with actual violence, where he

Reasons why on  
a contempt, the  
sheriff can't  
break open  
doors, or enter  
freehold.

## Process.

had a right to his rent, the sheriff could not be allowed to enter by force, to serve the ordinary process.

Ibidem.

Secondly, because in the time when the tenures were in their full height, it was thought too severe, that the lords that had generally demands on their tenants, should break in upon their tenants, since the violence of such a process in the first instance, might compel them to pay more than was due.

Ibidem.

Thirdly, because the party might be ready and willing to answer the demand, and therefore it is too severe to extort that by violence, which it doth not appear but that the party is ready to pay.

\* 760

Ibidem.

Fourthly, The whole process of a whole county must be served by the sheriff, but the law must, in a case of this kind, take notice, that it could not be served but in proper person; and it were too much, to lodge such discretionary power in the deputy of a minister, to violate mens houses, in execution of process, in the first instance. See the aforesaid M. S. *Treatise, of the Original of the Court of Chancery,*

And note, that the liberty of a man's own house seems to be a matter very much contended for, from the conquest till the settling of *magna charta*; for the conqueror carried his endeavours to restrain men from the freedoms they had been used to in their own houses, as may be seen in *Selden's Jamis*, 55. 65. And therefore, in the time of *Henry the 3d*, under the protection that the law gave to houses and castles, they used to shelter unlawful distresses, which were therefore inconveniences provided against by the statute of *Marlbridge* and *Westminster*. 1, 2. Ibidem. And see 2d Inst. 139. 193. And *Selden's Jamis*, 155. 165.

If the sheriff refuses or neglects to return any of the foregoing process of contempt, the plaintiff's attorney may proceed to fine him; and after a second fine, the court, upon motion of the \* plaintiff's attorney, will grant an attachment to the pursuivant against the sheriff; but if the sheriff hath taken the defendant's body, a *habeas corpus* must issue to bring him in, for the reasons beforementioned.

\* 761

The commission  
of rebellion.\*

The next process is a commission of rebellion; and this is a particular commission, directed to commissioners, generally four private persons, *conjunctione & diversitate*, commanding that *A. B. ubicunq. invent. foret infra regnum Hibernie, tanquam ribelli et legis nostrae contemporaneum attachiatis seu attachiari faciatis ut, &c.* Tot. 37.

By

\* A  
be decre  
is said  
cepted

*Process.*

By the 18th general rule, commissions of rebellion and attachments to the serjeant at arms, issue of course, the proclamation being first returned, and filed in the office, and the orders for the same duly taken out; and if the party will stand out to a commission, or serjeant at arms, his answer is not to be accepted, till he first enters into recognizance with security, to perform the decree of the court, if the other party desires the same.\*

R.U.L.  
Commission of  
rebellion and  
serjeant at arms,  
how they issue.  
And defendant  
to give security  
to perform the  
decree, if re-  
quired.

\* The rule for the commission of rebellion is entered of course at the instance of the plaintiff's attorney.

\* 762

If the defendant stands out, the process of contempt, either for not appearing, or not answering to a commission of rebellion, and afterwards enters an appearance, or puts in his answer (as the case is) without giving security, and paying the cost of the process, the course is, for the plaintiff's attorney to put a rule on the defendant, to give security to abide the decree of the court, and to pay the costs of the process in four days after service of the order for that purpose, or that the plaintiff may be at liberty to proceed notwithstanding the appearance so entered, or answer filed. And when the said four days are expired, then, upon an affidavit of the service of the said order, a certificate of the commission of rebellion being obtained, and of no recognizance entered into, and on motion of the plaintiff's attorney thereon, the court will make the said order absolute.

How the plain-  
tiff is to proceed,  
if the defendant  
after a com-  
mission of re-  
bellion appears,  
or answers,  
without giving  
security, or pay-  
ing the cost of  
the process.

In the case of *Gibbons* against *Leary* in this court, *Trin. 1757*, the defendant having stood out the process of contempt, to a proclamation of rebellion, entered an appearance; but not having given any notice thereof to \* the plaintiff's attorney, nor tendered the cost of the process, the plaintiff's attorney entered a commission of rebellion, and then obtained such order as aforesaid, for liberty to go on with process, notwithstanding the appearance: Afterwards a motion was made by counsel, on behalf of the defendant, to set aside the last order, as the commission of rebellion was entered after the defendant had appeared; but as the defendant had not given the plaintiff any notice of the appearance, nor tendered the cost before the commission was entered, the court on solemn debate, would make no rule.

Defendant to  
give notice of  
his appearance;  
and tender the  
cost of the pro-  
cess, or plaintiff  
may proceed.

763

Quer. Would not the case be the same, were the process or want of an answer.

Although

\* A defendant in equity is not originally obliged to give security to abide the decree, it is the contempt only that subjects him to this obligation. But it is said, that heirs, executors, administrators and trustees, are (as such) excepted out of this rule.

Where the demand is on the estate, the court will not compel the defendant to enter into recognizance, tho' he stands out the process to a commission of rebellion.

\* 764

Although the rule in this court be, that where a defendant stands out the process of contempt to a commission of rebellion, he shall (if required by the plaintiff) give security to abide the decree of the court; yet, if the demand be not personal, but a demand on the estate, the rule shall be dispensed with. It was so determined on full debate, in the case of *Darcy* against *Darcy* and *Darcy*, in this court, Trinity term, 1737, notwithstanding the plaintiff had before \* obtained such order for liberty to proceed on default of the defendant, in giving security to abide the decree, and paying the cost of the process as aforesaid, and had also obtained a sequestration, and an order for setting down the cause to be heard thereon, to have the bill taken against the defendant as confessed.

The commissioners may break open doors, to execute the commission of rebellion.

On this writ it is held, that the commissioners may break open the house of the party, or of another, where he is to take him, because the words of the writ are, that they should attach the party, *tangam rebellum et legis nostrae contemptorem*, and therefore, this is within the process of outlawry; for where you are to take the party as a contemnor of the law, the design of the writ is, that he should not be any where protected by the law, and therefore, it implies an authority to enter into the house. *Dalton* 253, *Compton*, 33, 47. 2 *Prax. Alm.* 61. 5. 60. 92.

The reason why this writ is directed to commissioners, and not to the sheriff, because the sheriff cannot be supposed to execute all such process in person: and it may be inconvenient to trust so great a power with a deputy of a sheriff's nomination, and therefore this court appoints its own commissioners, who are entrusted to do every thing very carefully, and are \* answerable to the court for their miscarriages.

\* 765  
What assistance the commissioners may demand and have, and how they are to proceed, if their prisoner be rescued.

The commissioners have power by their commission to call to their assistance any person, or peace-officer to assist them in taking the defendant; and by the writ, the sheriff is bound to assist them, but not to take their prisoner from them; and if any person shall rescue him, the court will order the rescuer to stand committed. 1 *Har. Ch. Prax.* 325. 3d Edit. *Prax. Regr.* in *Chancery*, 95.

Commissioners of rebellion, if to be paid, and how to act when the process issues before, and when it issues after a decree.

On commissions of rebellion, the commissioners are not intitled to any certain fixed fee, but shall be paid for their trouble as they deserve; they can take bail for the defendant's appear-

## Process.

ance \* unless this process issues after a decree, in which case they must bring up their prisoner, and have him committed to the *Four-Courts Marshal's*, which the court will do on an attorney's motion, where he is to remain until he has paid the money, or \* performed the decree, and cleared his contempt, and the court will order him then to be discharged. But note, the justices of the peace cannot bail the defendant, although it is an offence against the publick peace. *Pract. Regr.* in *Cham. 95.* 2 *Ch. Rep.* 262.

\* 766  
A justice of  
peace cannot  
bail the defen-  
dant.

The bail is usually taken by the commissioners in their own names, with a condition for the defendant's appearance, and the defendant, upon his being admitted to bail, ought to pay the costs of his contempt. 1 *Har. Ch. Pract.* 325, and *Pract. Regr.* in *Ch. 95.*

If the commissioners refuse to return the writ, the court on motion of the plaintiff's attorney, will order them to return it; which order if upon service they obey not, process of contempt may issue against them. And if they take the party, and suffer an escape, the court, on affidavit and motion, and a day given to shew cause to the contrary, will order them to be committed; till they bring him in, or pay the debt and cost. 1 *Har. Ch. Pract.* 324. *Toth.* 38, 39.

How the com-  
missioners may  
be punished, if  
they return not  
the writ, or let  
the defendant  
escape.

When a commission of rebellion has issued against the defendant, he must, (as has been said) enter into a recognizance to perform the decree, before his answer shall be received. And for this purpose, his attorney is to move, \* that it may be referred to a baron, to measure the security the defendant is to give, and the court will make an order for that purpose, and then, he is to take out a summons from the baron, to attend the reference, and is to serve the plaintiff's attorney therewith, and also with a copy of the order of reference, and to proceed thereon, as on other references: And when the baron hath signed his report, it is to be brought to the chief baron, and the defendant is to enter into a recognizance, in the sum measured by the baron, for performing the decree.

The proceed-  
ings on entering  
into security,  
upon a com-  
mission of re-  
bellion.

\* 767

If the plaintiff fails to attend on the second summons, the *Ibidem.* baron will proceed *ex parte.*

The defendant is to procure two sufficient persons to be security for him, but the defendant is not to execute the recognizance, nor is he obliged to serve the opposite party with the names

*Ibidem.*

\* After a decree, the practice now is, upon a *non est inventus*, being returned upon an attachment, to issue a *serjeant at arms*. See title *Decree*, &c. And in any case whether before, or after a decree, the commission of rebellion is seldom executed; if it be before a decree, on a *non est inventus* thereon, an attachment to the *serjeant at arms*, issues, and upon the like return by him thereon a *sequestration*.

*Process.*

names of the sureties; however it will not be amiss to send them twenty-four hours before the hour, to be appointed for entering into the recognizance.

Ibidem.

\* 768

Ibidem.

The chief baron sometimes requires the sureties to swear themselves worth double the sum, measured for the security, but this is only where the sureties are not known, or where there is \* any doubt as to their substance, or circumstances.

When the recognizance is perfected, then the chief baron's clerk is to sign a certificate thereof, and to deliver the same to the defendant's attorney; and upon his producing this, and a receipt from the plaintiff's attorney, for the cost of the process, the answer shall be received.

Ibidem.

If after the order of reference hath been obtained, the defendant's attorney shall neglect or delay, to proceed thereto, the plaintiff's attorney may proceed to discharge the order of reference in like manner, as upon a reference of exceptions to short answers.

Ibidem.

Bail may be given before a baron on circuit.

If the defendant would give bail before a baron on the circuit, he is to apply to the court, by his counsel, for an order for that purpose, and the court will grant it; but he is to give proper notice of the motion, to the attorney for the opposing party.

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*Serjeant at Arms.*

An attachment to the serjeant at arms, on return of a non est inventus, on a commission of rebellion.

\* 769

The serjeant at arms, an ancient officer; and his business.

THE next process, after a commission of rebellion, is an attachment or writ directed to the serjeant at arms; and this is granted on a return of a \* *non est inventus*, upon a commission of rebellion, upon motion of the plaintiff's attorney; but the rule is usually entered of course in the office. See the 18th general rule, pa. 761.

And the serjeant at arms is an ancient officer belonging to this court; and he also attends the house of commons; and his office there is to keep the doors, and to execute such commands, touching the apprehension and taking into custody of any offender, as the house shall injoin him: He is also to attend the person of the king, and to arrest persons of condition offending, and to give attendance on the lord high steward, in sitting in judgment on any traitor. He is intitled to two pounds

### Process.

ten shillings caption fee, nine pence a mile travelling charges, and six shillings and eight pence a day for every day his prisoner is in his custody.

By an order made in the *Chancery of England*, by the earl of *Macclesfield*, the plaintiff may move of course for a serjeant at arms, in all cases, on the return of a *cepi corpus*. *Mosley's Rep.* 305.

A serjeant at arms, in all cases, on a *cepi corpus* returned.

Here it may be inquired, why there must be a serjeant at arms, after the return of the commission of rebellion, \* before a sequestration can issue; and the reason seems to be, because commissioners, for executing the commission of rebellion, are of the plaintiff's own nomination, and the court will not issue a process upon the whole lands and goods of the defendant, until one of its own officers see that the defendant do totally disappear; and hence it is, that the return of the serjeant at arms, is particularly recited in the sequestration.

Why there must be a serjeant at arms, after a commission of rebellion, before sequestration can issue.

\* 770

If the serjeant at arms, refuses or neglects to return this process, the plaintiff's attorney may proceed to fine him; and after a second fine, the court, upon motion of the plaintiff's attorney, will grant an attachment to the pursuivant against the serjeant at arms. If the defendant be taken on this writ, the serjeant usually takes bonds for his appearance, if not, the defendant is to be committed to the *Marshalsea* of the *Four Courts*: But note, the sheriff is not bound to take his prisoner from him.

The proceedings against the serjeant at arms, for not returning his process. How he is to dispose of his prisoner. The sheriff not bound to take him.

On process of contempt against *baron* and *feme*, the wife may be taken into custody by the serjeant at arms; and he shall have fees from the husband for both; but upon the wife's putting in her answer, she shall be discharged, \* without being obliged to give security to abide the decree, as he must, if the plaintiff shall require it.

Husband and wife may be taken by the serjeant at arms, but the wife to be discharged on putting in her answer.

\* 771

By two orders, 18th and 22d May, 1713, upon reading the humble petition of *Richard Powey*, esq; serjeant at arms of this court, and *John Cameron*, gent. pursuivant of the said court, complaining that after writs are delivered to them from the several officers of this court to them respectively directed, and that they, in obedience thereto, send down, at their own expense, men and horses to execute the same, to their great cost and charges; and that by reason of notice given, or some other means, the persons against whom such attachments issue, abscond, or withdraw themselves, so that they cannot be taken, and afterwards the attorneys of the said court discharge or supersede the serjeant at arms, or pursuivant to such attachment, but take no care to see the petitioners satisfied their respective due fees, and charges, that they were at as aforesaid.

No discharge, or consent of either plaintiff or attorney, directed to the serjeant at arms, or pursuivant, to be of any avail, unless their fees be paid.

It

### Process.

\* 772

It was therefore ordered by the court, that whenever any writ of attachment shall issue respectively, to the serjeant at arms, or pursuivant of this court, and that in obedience thereto, they respectively send down their messengers to execute the same, that no discharge or consent from any attorney of this court, or his client, only, shall be of any avail, or hinder the execution of the said attachments, unless their respective fees be first paid: And that no person or persons, to be taken on any attachment, shall be discharged from the serjeant at arms, or pursuivant, until the said person, or persons do first produce to them a *supersedeas*, under the seal of this court. And the respective officers, of this court, to issue no *supersedeas*, to such attachments, without the person, so suing for the same, do first pay off the said serjeant at arms, and pursuivant, their respective, usual, and due fees: And that until they are paid their respective fees, the said serjeant at arms, and pursuivant, respectively, shall be at liberty to renew the said attachment notwithstanding the attorneyes to such contempts, shall not renew, or consent to the renewing the same.

### Of Sequestrations.

Sequestration  
what, and when  
introduced.

THE next and last process is a sequestration, which was first introduced in lord Bacon's time, and then but sparingly used in process, and after a decree, to sequester the thing in demand. *1 Vern. 421.*

Of the sequestration, and sequestrators at the civil law.

\* 773

This is a process in great use in the civil law, as appears by Domat's \* *Treatise of the Civil Law*, Vol. 1. Tit. 7. of a *Depositor* S. 4. pa. 138, to 148. And sequestrators are there said to be appointed in two cases, either by the common consent of the parties, when they all agree to it, or by the judge, when the uncertainty of the owner of the thing controverted, and the necessity of committing it to the care and keeping of somebody, oblige the judge to order the thing to be sequestered pending the suit. And this is there called a judicial sequestration; which is different from that made by consent of parties this being a covenant, the other a regulation made by the judge. For much curious learning on this process, see the said author.

Process of sequestration two-fold, and may be said to be twofold, that is, it issues either as mesne, and process on the defendant's default in not appearing, or not answering, after the whole process of contempt have been spent against

*Process.*

gainst him; or it issues as a judicial process in pursuance of decree, and to enforce the performance of it; and it is the execution and life of a court of equity; and as it is the fruit of a long suit, it is to be favoured, and in this case, it is said to be analogous to an execution at the common law. <sup>1 Will-</sup>  
<sup>ams, 308.</sup>

\* *And first of the Sequestration on mesne Process.*

\* 774

A SEQUESTRATION, on mesne process, is issued by order <sup>Sequestration</sup> of court, on a counsel's motion, upon a *non est inventus* or *mesne pro-cessis*.  
being returned upon the attachment to the serjeant at arms; and it is generally directed to four or more commissioners, <sup>How directed.</sup> empowering them to seize the defendant's real and personal estate into their hands, and receive and sequester the rents and profits of his real estate, until the defendant shall have answered the plaintiff's bill, or perform some other matter which has been ordered by the court, for not doing whereof he is in contempt as aforesaid.

And these commissioners are called sequestrators, and are <sup>Sequestrators</sup> accountable to the court, and are to act in the execution of <sup>accountable and</sup> their office, according to the direction of the court; and they <sup>how they are to</sup> are to make return, from time to time, of what they have seized, as the court directs, and are to account for what comes to their hands, and to bring the money into court, as the court shall direct, to be put out at interest, or otherwise disposed of, as shall be found necessary; but this money is not usually paid to the plaintiff, but is to remain in court till the \* defendant hath appeared, or answered, and cleared his contempt; and then whatever hath been seized, by virtue of the sequestration, shall be accounted for, and paid him; however, the court hath the whole under their power, and may act therein agreeable to the equity of the case: And the plaintiff's counsel may move and obtain an order for the tenants to attorn, and pay their rents to the sequestrators; or for the sequestrators to sell and dispose of the goods of the party, and keep the money in their hands, or bring it into court, as the court shall see fit.

\* 775

How

*Process.*

Sequestration how to be executed, and the proceedings to enforce it, in case of disobedience, see page 773. And  
proceedings in case of disobedience.

Goods sequestered, of a perishable nature, may be sold by order of court.

Where goods, that are of a perishable nature, are sequestered on mesne process, the court will, upon application of counsel, order the sequestrators to sell them; but without the direction of the court, they cannot even remove the goods much less sell them, for the goods are only to be retained, in nature of a pledge, to answer the contempt. *Bunb. Rep.* 273.

Sequestrators on mesne process to retain only, so far as to satisfy the contempt.

Sequestrations, on mesne process, are accountable for the profits; and can retain only so far, as to satisfy for the contempt. 1 *Vern.* 248, and see *Bunb. Rep.* \* 273, where it is said that a sequestration, for want of an appearance, is to be looked upon only as a *distringas, ad infinitum* at law.

\* 776  
One defendant proceeded against, so a sequestration, and not appearing, plaintiff may proceed against the rest.

This process is like an outlawry at common law, so that a defendant, who cannot be found, is proceeded against, to sequestration, and does not then appear, you may proceed against the rest. 2 *Ch. Ca.* 139.

Trustees failing to appear, how to proceed against them.

If a trustee should fail to appear, and proceed to a sequestration should issue against him, the court shall proceed as if he had duly appeared, and put in his answer. See the act of parliament among the proceedings on hearings upon bills taken *pro confesso*.

Sequestration against one defendant and cause heard against the other defendants, yet he may come in and answer.

Where one of the defendants is in contempt to a sequestration for want of an answer, and the cause is heard against the other defendants, yet the defendant, who is in contempt, may come in and answer, and the cause may be heard again as to him. 2 *Vern.* 228.

Sequestration nisi against a peer for want of an answer, and he puts in an insufficient one, yet the order for the sequestration shall not be made absolute.

A sequestration is the first process against a peer, or member of parliament; but if there be an order for a sequestration nisi against a peer for want of an answer, and he puts in an insufficient one, yet the order for the sequestration shall not be made absolute, but \* a new order for a sequestration nisi shall be made. 2 *Williams*, 385.

\* 777  
Sequestration may issue against an infant for not appearing.

A sequestration may issue against an infant for not appearing. 2 *Ch. Ca.* 163.

### Procesſes.

And here let it be observed, that the several procesſes of *processus*, *attachment*, *alias* and *pluries*, and the writ of proclamation do issue of course without motion; because the clerks of the office, when there is an affidavit of the service of the summons, do know whether there is an appearance or not, and the defendant not appearing, upon the return of each procesſ, the warrant for making out the other; but the last prerogative procesſes are not to issue but by order of court; because it must first appear to the court, that the common ministers of justice are not able to take the party, before they shall have recourse to this extraordinary method. For the method of setting own causes to be heard on sequeſtrations, and proceedings thereon, See *Title Hearing on Bills taken pro confesso.*

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### Of Sequeſtrations on Decrees and the Proceedings thereon, with ſome Proceedings on Sequeſtrations in general.

\* 778

HAVE before mentioned that there are two sorts of decrees, a decree *in personam*, and a decree *in rem*; and that the decree *in rem* is generally executed, by an injunction to the sheriff, to put the party in possession of the land, or other thing demanded; that the decree, *in personam*, is executed by giving an attested copy thereof, with an injunction to the party for the performance thereof, &c. And that upon an affidavit of the service thereof, and of a demand made of the party, or other thing decreed, and of having a proper power to receive the same, and of disobedience, or refuſal, the court will grant an attachment, and that upon a return of *non est* *cautionis* thereon, a ſergeant at arms, and upon the like return thereon, a ſequeſtration. See *Title Decree*, &c.

A decree for land, generally executed by an injunction to the ſheriff to put the party in possession; a decree for a personal demand, by a ſequeſtration, and the proceedings to obtain ſuch ſequeſtration.

And this writ of ſequeſtration is usually directed to four persons, who are named by the party, to whom the writ is directed; and it is thereby commanded, that they, or any one or two of them, do at certain, proper, and convenient times, go to, and enter upon, all the real estate of the defendant, and take, collect, and get into their hands, \* not only the lands, and profits of the ſaid real estate, but also his goods and chattels, and personal estate, and to detain, and keep the same under ſequeſtration, until the defendant shall fully obey, fulfil, and perform the ſaid decree, in every particular, and for his contempts, and the court make other order to the contrary.

\* 779

The

Sequestration,  
how to be ser-  
ved, and the  
proceedings.

The sequestration being so directed to the sequestrators, and two or more of them, therefore two of them at least, must themselves serve the sequestration on the several tenants, that is, one of the two must serve it in the presence of the other, they cannot make an attorney for this purpose, nor delegate their power: And the tenants also are to be served personally, and this service of the sequestration, by the sequestrators, of the lands, is considered as a seizing and sequestrating: Then upon affidavit of the service of the sequestration, and of counsel's motion thereon, an order is to be obtained for paying the rents to the sequestrators; which order is to be also personally served. And it is said, it must also be served by two of the sequestrators as aforesaid; then an affidavit of this service is to be made, and a motion, by counsel, that the tenants may pay their rents to the sequestrators, in a reasonable time, to be prescribed by the order, or shew cause why he should not be attached; and \* this order, (it is said) must also be served by two of the sequestrators, and a personal demand made, and if the rents be not paid, then, on affidavit of such service, demand of rent, and non-payment, and certificate of no cause shewn, the court, on counsel's motion, will grant an attachment.\*

Cause shewn  
against paying  
the rent to the  
sequestrators.

\* 780  
Sequestrators  
cannot distrain.  
Tenants may  
voluntarily pay  
their rents, or  
give security.

But where the tenant can shew cause against paying the rent, as that \* there is a prior sequestration, *custodiam*, or the like, there the court allows the cause.

\* 781  
But sequestrators cannot distrain, if they do, they will be punished by the court; but if on service of the sequestration the tenant voluntarily, and without any order, pays the rent or part of it, or gives security for it, this is good; so determined in the *Exchequer*, in the case of the Attorney General against *Wynne* and *Bingham*, 7th May, 1745.

A sequestra-

\* These difficulties attending the execution of this sequestration, are more than it may be possible to surmount; besides the delay and trouble of two orders entirely to the same purpose: If the sequestrators themselves must not only serve the sequestration, but every order in the cause, what person of any credit, would be a sequestrator? And if the sum be large, what may be the hazard in employing poor, or mean persons? Why may not the first order, (if two orders of the same kind are to be served) be served by a common person? or why need it be served personally? When the order, of which the money is demanded, comes to be served, it may be proper that two of the sequestrators should themselves serve this, and that it should be personally served.—For the sake of publick dealings, intercourse, and commerce, and of borrowing and lending, those great advantages in trading nations, and without which they cannot possibly, for any time exist, the security of money, and the ease of getting it in, should be the primary consideration of every society, and of every government, where there are municipal laws for the transaction of property.—See the case of *Wise* against *Donaldson*, Mich: term, 1753, *Kennedy* against *Fitzgerald*, Hilary term, 1754, and *M'Nemara* against *M'Nemara*, Trinity term, 1760, all in the court.

## Process.

A sequestration may be had of both lands, and goods, where the thing decreed is a personal duty. *1 Ch. Ca. 92.* for lands and goods where the decree is for a personal duty.

And it hath been sometimes granted for money of the party, in the hands of others. *Toth. 173.* Sequestration for money in a third person's hands.

Hence it appears, that there is a large trust reposed in the commissioners named in the sequestration, and therefore great care ought to be taken, that they be such as are able to answer for what shall come to their hands, in case they should be called to an account.

And therefore, a general rule was made in the *Exchequer*, 5th July, 1743, that all sequestrators, before the act, do enter into a recognizance, to be \* accountable for all such sums as shall come to their hands: But note, though this seems to be a very good rule, it is not now adhered to.

They are not to dispose of any part of the estate they have sequestred, without leave of the court; and they are to behave themselves, in all other acts relating to their office, as the court shall direct.

If the lands, against which the sequestration issues, be in the hands of the defendant, and not set to tenants, upon affidavit thereof, and on counsel's motion thereon, the court will make an order for the officer to set the lands for a year, from some certain time, the lessee or lessees giving security; and if the tenants be disturbed, the court will attach the offenders. See the aforesaid case of *Kennedy against Fitzgerald*, in this court, *Hilary, 1754.* In *England*, the practice is, upon such application, to grant an injunction to put the sequestrators into possession; and they to set and let; but this may be attended with ill consequences to the sequestrators, as they would be accountable not only for what they made, but what they might have made, without wilful default.

Upon affidavit that the defendant was gone to *Holland*; to avoid the \* plaintiff's demand, and he having before been arrested, upon an attachment, and a *cepi corpus* returned by the sheriff, the court upon motion, granted a serjeant at arms against him, and upon the return thereof, a sequestration. *1 Jon. 334.*

Where lands of the husband, out of which, an annuity to the wife issued, were sequestered, the husband dying the sequestration was discharged, as to the annuity. *1 Ch. Rep. 147.*

The defendant, after been taken on an attachment, goes into foreign parts, court granted a serjeant at arms.

\* 783  
Sequestration on lands, out of which the wife has an annuity, discharged by the death of the husband.

A voluntary

**Conveyances to avoid a sequestration for a personal duty, void.**

**Sequestration binds from the time of awarding.**

**Goods sequestered not sufficient, the proceedings.**

\* 784

A voluntary and fraudulent conveyance, to avoid an approaching sequestration for a personal duty, is no bar to the sequestration. 2 Ch. Cz. 46.

A sequestration binds from the very time of awarding the commission, and not only from the time of executing it, and its being laid on by the commissioners, for if that should be admitted, then the inferior officer would have *ligandi, et ligandi potestatem.* 1 Vern. 58.

If the goods sequestered are not sufficient to satisfy the plaintiff his demands, he may move by his counsel to renew the order for a serjeant at arms. See *Moseley's Rep.* 246. Sed quæ if this be the method? see *Bunb. Rep.* 62, where it is said, the sequestrators may be renewed at the first instance, \* but that the former sequestration must be first returned; and that until then the court will not grant an order for sale of the goods which must be first obtained on counsel's motion, before the goods can properly be sold, and then a *venditioni expensæ* shall issue.

**Account ordered on a first sequestration, at the instance of a party who hath a second.**

If a party obtains a sequestration, on a decree, and that former sequestration hath issued, and he apprehends the sequestrators have received sufficient to discharge the demand for which the former sequestration issued, the court, on motion of the attorney for the party, who obtained the second sequestration, will order the sequestrators in the former sequestration to account before the officer, though it issued in cause, between other parties. So ordered in the case of *Buquier and Sandys*, in this court, 12th of July, 1748.

**Third person having an interest in the thing sequestered.**

**How persons who have a title paramount to the sequestration, are to proceed to be relieved.**

\* 785

If a third person claims an interest, in the thing sequestered, he must come in and be examined, *pro interessè suo*; but no motion can be made for this purpose, until the sequestration be returned.

Where sequestrators seize the real estate of the party, and person who claims title to the estate so sequestered, either by mortgage, or judgment, lease, or otherwise, or who has title paramount to the sequestration, shall not \* be obliged to bring a bill, to contest such title; but may move the court of course to be examined *pro interessè suo*; and in this case, the plaintiff is to exhibit interrogatories in order to examine him and for a discovery of his title to the estate, and he may be examined thereon accordingly; and the parties may end into proof, touching the title to the estate in question; and it shall appear that the party who is examined *pro interessè suo* hath a plain title to the estate, and is affected with the sequestration, then it is to be discharged as against him, without costs, as the court sees fit, upon the circumstances of the case. And there may happen other circumstances a proceeding

proceedings upon a sequestration, which cannot fall within the general rule here laid down, and which must be determined according to the nature of the case, and as it appears to the court. 1 *Harrison's Ch. Pract.* 3d Edit. 328.

If the decree be against a peer, or lord of parliament, after Decree against  
hs hath been served therewith, the court, on counsel's motion, will order, that he shall perform the same, in such time as they shall think proper, or that a sequestration shall issue against him, by the time the process to a sequestration could issue, against a person not intitled to privilege.

\* In the case of lady *Dacres* against *Chute*, 1 *Vern.* 160, the sequestrators having by virtue of an order of the court power to fell timber, they fell timber to the value of seven thousand pounds, and pay over but two thousand pounds to the plaintiff, for whose benefit the sequestration was taken out; the lord keeper would not charge the plaintiff with more than the two thousand pounds, though the defendant was an infant, saying the sequestrators were the officers and agents of the court, and men must take care to pay their debts, at their peril.

A sequestration, that issues as a *mesne* process of the court, will be discontinued, and determined by the death of the party; but where a sequestration issues in pursuance of a decree, and to compel the execution of it; there, though the same be for a personal duty, it shall not be determined by the death of the party. 1 *Vern.* 58. *Sed vide* 1 *Vern.* 118. 166, and 2 *Peer Williams*, 621, 622, where it is said, that although such decree may be revived against an executor, or administrator, if there be a personal fortune, yet if there be not a personal fortune, the lands, in the hands of the heir, shall not be affected by the decree; nor \* shall such sequestration bind the feme, who came in for her jointure, or dower.

decree. Nor shall it take place of the wife's jointure.

\* 787

But if the decree were upon a covenant, that bound the heir, and the defendant died, such decree might be revived by *subp<sup>na</sup> scir. fac.* against the heir, to shew cause against the decree, if the decree be enrolled of record; or if not, by bill of revivor, and when you have revived against the heir and executor, you may also revive the sequestration, upon motion, if upon coming into court they can shew no cause, why the decree should not be revived.

But it was resolved, in lord *Somers*'s time, that a decree should have the same authority to bind the personal assets, as a judgment at law; and therefore shall go *pari passu*, to be paid off and discharged. But the lien of the judgment upon

But not other-  
wife.

lands,

*Proces's.*

lands, came in by the statute, which only gives an *elect*, for a moiety of the land, in satisfaction of the debt; and therefore, that could give no authority, to lay on a sequestration, on the real estate, for a meer personal duty, where the heir is not bound in the covenant. See 1 *Vern.* 58. 118. 166.

\* 788

No order granted to renew, or discharge a sequestration until returned.

\* And note, that the court will not make any order, to renew or discharge a sequestration, in any case, until it is returned; for the sequestrators are answerable for what they receive, and they have nothing to indemnify them, but the authority given them by the sequestration. *Bunb. Rep.* 31. 62.

Writ of assistance granted for sequestrators they having been opposed. And injunction if possession be withheld, or taken.

If sequestrators shall be opposed in the execution of their office, the court upon their affidavit and certificate thereof, will grant them a writ of assistance. *Bunb. Rep.* 168. If the possession be withheld, or taken from them, the court, on affidavit thereof, will grant an injunction, to restore, or quiet them, as the case is; so ordered in the case of *Bridges against Carroll*, in this court, 16th of July, 1731.

Sequestrators to be paid for their trouble, and what.

In the case of the Attorney General against *Carden* and others, on a hearing, in this court, *Trinity term 1760*, a question arose, if sequestrators are intitled to be paid for their trouble. And counsellor *Roberts*, whose father had been deputy chief remembrancer, for many years, and who had himself acted in the same office, for several years, acquainted the court, that his father and he had always allowed the sequestrators. That they are intitled to their expences, seemed not to be questioned.

\* 789

Intitled to their salary and expence at the civil law, and were to account with the person adjudged owner.

\* And *Domat* in his Civil Law, Vol. 1. Tit. 7, of a *depositum*, Sect. 4. pa. 147, says, that after the controversy is ended, the sequestrator is obliged to account, to the person who is adjudged to be master, and to restore to him the thing sequestered, with the fruits, if it produces any, he being paid his salary, and his expences.

adjudged owner, and to restore him the thing sequestered, &c.

Sequestrators if trustees for the right owner.

From this rule in the civil law, and really from the whole tenor of the said title of a *depositum*, pa. 138, to 148, it would seem as if the sequestrators were considered as trustees for the right owner, of the thing sequestered. And in the aforesaid case of the Attorney General against *Carden* and others it was a principal point, and was most learnedly debated. But the cause abated by the death of one of the parties, before the court gave judgment.

*Process.*

*Some Rules concerning Process of Contempt.*

EVERY process of contempt is to be tested in term time, or in one of the sitting days after term, and they must all be made returnable, on one of the return days in term, except the sequestration, which has no limited time for its return.

How to be tested and made returnable.

\* In equity, there need not be one day between the test day, and the day on which the process is returnable, but care must be taken, that each and every of the process be tested on a day, subsequent to the day on which the next preceding process was returnable; for should a subsequent process be tested, on the return day of a former process, it is irregular.

\* 790  
Ibidem.

No answer shall be deemed to be filed, until the contempt be purged; and until the same shall be so purged, the plaintiff may prosecute the contempt, notwithstanding any answer alleged to have been filed.

Answer not deemed as filed, till the costs of the contempt be paid.

If the defendant tender the cost, and the plaintiff refuses to receive it, the court, on motion of the defendant's attorney, will give him leave to lodge it with the officer. See *Title Answer.*

Mr. baron *Wainright* was of opinion, that though a defendant should, after the time for appearing or answering was expired, enter an appearance, or file an answer, yet, if the plaintiff had entered process, on the same day, the process would be regular; for that the defendant by not appearing, or answering, in the time prescribed him, by the rules of the court, shall be \* deemed in contempt; and the practice was so for some time, but it is now otherwise: And yet, in *Bunb. Rep.* 31, 290, it is said to be an established rule, in the *Exchequer in England*, and that in such case, the defendant shall not have further time to answer, without entering his appearance with the register, as upon a contempt.

Appearance entered, or answer filed, after the time is expired, an attachment the same day, if attachment shall hold.

\* 791

But in an injunction cause, the attachment (it is said) is so good, as to warrant an injunction thereon; and that the diligent practice of this court is so.

It shall be good for an injunction.

If the defendant comes in, and appears, and purges his contempt, (which is to pay the cost of all the process) he shall be discharged.

Defendant discharged on paying contempt.

## Proces.

RULE.  
Agreement to  
stop proces to  
be in writing.

A rule was made in this court, in 1736, that no agreement to stop process of contempt should be binding, so as to stop the proces, unless such agreement be reduced into writing, and signed.

Man and wife  
in contempt,  
attorney to have  
fees but as for  
one.

Proces cannot  
be revived, and  
if dead above a  
year, an order  
must be for li-  
berty to pro-  
ceed.

\* 792

When a man and his wife are in contempt, the attorney is not to have fees for both, for in this case they are accounted but as one.

Proces of contempt as they are personal, abate absolutely by the death of either party, plaintiff or defendant; \* and cannot be revived. *Sed quer.* if a sequestration has issued on a decree, as to a personal estate? See pa. 784. And if proces lie dead above a year, they cannot be proceeded on, without an order for that purpose, which the court will grant on an attorney's motion.

Affidavit, if  
filed before the  
return of the  
attachment, the  
arrest is good.

Defendant ta-  
ken upon an at-  
tachment, either  
on mesne proces  
or after a  
decree to be dis-  
charged on his  
appearance.

And on certifi-  
cate thereof, the  
sheriff is to de-  
liver up the  
bond.

\* 793

Proces deter-  
mined by the  
demise of the  
king.

If a man is arrested upon an attachment, the arrest shall hold good, though no affidavit be filed at the time of taking forth the attachment, if it be filed before the return of it. *Vern.* 172.

If one be taken upon an attachment, either in proces or in execution, after a decree, yet in both cases, on his appearing before the register, he is to be discharged, and to answer the interrogatories at large, not in custody; and if he be continued in custody, the court, on motion, and appearing before the register, will discharge him. *Hilary* 1700, between *Danby* and *Lawson*. See *Bac. Equity Ca.* 351.

So, if the sheriff takes one upon attachment in proces, he is to give a bond of forty pounds penalty to the sheriff, to appear and answer; but for one taken up in execution, after a decree, the sheriff may insist on security, proportionable to his duty; but \* in both cases, on the register's certificate, that the party has appeared, the sheriff is to deliver up the bond. Agreed to by the registers, and ruled by the master of the rolls. *Hilary*, 1700, between *Danby* and *Lawson*, *Bac. Eq. C.* 351.

Upon a motion for a serjeant at arms, on a commission of rebellion returned, it was held, that by the king's demise every proces of contempt not executed, is determined, so that the party must begin again at an attachment; but where an proces is executed, and a *cepi corpus* returned, there the proces stands good. *1 Vern.* 300.

But an attachment was sued out in the time of king *Charles* the second, and executed three days after his demise, but before notice of his death, and it was adjudged to be well executed, and the proceedings thereon, regular. *1 Vern.* 400. *2*

## Process.

If the defendant is in contempt for not answering, and on motion he obtains time to answer, if it be not expressly ordered that all contempts in the mean time shall be stayed, the plaintiff may go on, and prosecute the defendant for not answering. *Vern. 104.*

By an order for time to answer, all contempts are not stayed, unless it is so ordered.

\* If joint process issue against several defendants, and any one of them shall come in and answer, or is taken on the process, he shall pay the whole costs of the process; for in this case they are not multiplied or increased, though there be several defendants; and if the process had issued against the defendants separately, each defendant must have paid the costs of the process against him, so that no injury is done, but rather a benefit; as the defendants in the case of joint process, may settle the costs among themselves, and make each man's proportion very easy. It was so determined in the case of *Brown and Blake* in this court, Hilary term, 1749.

\* 794

When the process is joint, any defendant who is taken thereon, or comes in to answer, must pay the whole cost, not ~~proportionately~~.

And here it is to be observed, that the contemnor, who is in contempt, is never to be heard by motion, or otherwise, until he hath cleared his contempt, and paid his costs: As for example, if he comes to move for any thing, or desires any favour of the court, if the other side says, or insists he is in contempt, though it is but to an attachment for want of an answer, yet even in this case he is not intitled to be heard, until he hath paid the costs of the attachment (however small they are) to the party, or his attorney, and he must produce receipt for them in open court, before \* he can be heard; and this is always allowed as a good cause, against hearing the contemnor in any case whatever.

The cost of the contempt to be paid, before the contemnor shall in any case be heard.

\* 795

In the case of *Kearny against Stewart*, and *e contra* in this court, Mich. term, 1749, the court refused to grant the plaintiff in the cross cause, the usual order to refer exceptions to a short answer, as a punishment for his contumacy, he not having paid the costs of process of contempt, which had issued against him to a sequestration, before he had answered the original bill, or entered into security to abide the decree; besides the court said, it had the appearance of a contrived delay. And in all cases a party comes but with a bad grace before the court, on any application, who has contemned or disobeyed their rules or orders.

The court refused a plaintiff in a cross cause, the usual order to refer the exceptions to a short answer, not having paid the cost of contempts, for not answering in the original cause.

For the proceedings against peers of the realm, and other privileged persons, see *Letter Missive and Privileged Persons*.

\* 796

\* *Reference of the Regularity of Process of Contempt by the Officer.*

Reference of  
the regularity  
of process to  
the officer.

**I**N running out the process of contempt, the plaintiff must be very careful in proceeding regularly; for if one of the processes has issued irregularly, that process shall be set aside, and also, all the subsequent processes.

And the pro-  
ceedings.

If the defendant apprehends, that any one of the processes has issued irregularly, if the process be for want of an appearance, he is first to enter an appearance, and then the court upon motion of his attorney, will order that the regularity of the process be referred to the officer, and thereupon, the officer issues a summons, by which he appoints all persons concerned, to meet him at the chief remembrancer's office on a certain day and hour, named in the said summons, to proceed upon the reference, and this summons is to be served twenty-four hours at least before the appointed hour for attending before the officer; and for this summons the defendant is to pay two shillings and six pence.

Summons to be  
served.

\* 797  
If the process  
be reported re-  
gular, defend-  
ant to pay costs.

And a copy of this summons is to be served on the plaintiff's attorney; and if the attorneys on both sides attend, then the officer proceeds to \* examine the process of contempt; and if the officer reports that the processes have issued regularly, then the defendant is not only to pay the costs of the process, but also the costs of the reference and report. The officer's fee for the report is ten shillings.

Process irregu-  
larly issued.

If the officer shall report that all the processes of contempt have issued irregularly, then the whole set of processes shall be set aside, and the plaintiff shall pay the defendant the costs of the reference and report, to be taxed by the officer.

See my Practice of the *Pleas Side of the Exchequer*, for further proceedings on these references, which are much the same, with the proceedings in this side of the court in such cases; but there is no settled rule in the *Chancery* side of the *Exchequer*, as to the number of summonses to be served, it is discretionary in the officer.

*Proces.*

And for the method of confirming the report, and how either party, who thinks himself aggrieved, may apply to be relieved, see *Title References*.

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*Of References, Reports, and Exceptions* \* 798  
*thereto.*

A REFERENCE is an order of court, whereby divers matters, as exceptions, accounts, &c. are referred to the what. Aton, or to the officer of the court, to examine and make his report thereon, to the end that the court may make an order absolute, and determine such matters.

And sometimes the officer is empowered by the order of reference, to determine the matters therein mentioned, as to costs, or to examine into the regularity of proceedings, or the matters relating to the practice of the court.

In what cases the officer is empowered to determine matters.

And no reference shall be made upon a demurrer, or question touching the jurisdiction of the court, but such demurrer, &c. shall be heard and determined by the court. *Ibidem.*

No reference on a demurrer or matter, touching the jurisdiction of the court.  
Report what.

A report is a certificate from the baron, or the officer of the court (according to the reference) how the facts or matters referred by the court are, or do, upon examination, appear unto him; or of some thing which it is his duty to inform the court in.

\* And they are to draw their reports briefly and succinctly, referring the matter clearly for the judgment of the court, without recital of the several points of the order of reference, the debates of counsel before them, unless it be in cases doubtful, when they may shortly represent the reasons which induce them to what they do.

\* 799  
Rules for drawing them up.

The officer shall not on the importunity of counsel, or any other person, make a special report, unless required by the court to do so, or that his own judgment, with respect to difficulty, leads him thereto.

No special report, but on matter of difficulty, or by order of court.

*Process.*

No exceptions to the officer's report, on matters of practice, or on taxing costs, but the party aggrieved shall be relieved on motion.

Attorney to pay five pounds out of his own pocket for every exception.

\* 800

Exceptions only to be to reports, that need confirmation; or to special reports, but motion to be to discharge others.

If defendant excepts to the report, the plaintiff may also except.

**RULE.**  
Time for entering reports, certificates and affidavits.

**RULE.**  
The time for setting down exceptions to reports, to be argued.  
To be disallowed, if not set down in time.

\* 801

Time for serving order, for setting down exceptions.

No exceptions will be allowed to the officer's report, upon matters of practice, nor on taxing costs; but if he allow such costs, as ought not to be allowed, or are not allowable by law, or if the party against whom the report is made, shall think himself aggrieved thereby, he may (upon proper notice given) move the court by his counsel, and on such motion the court will examine into the report, and relieve him, if they see reason.

In the case of *Latin* against *Moore*, in this court, exceptions were taken to the officer's report, about practice, and lord chief baron *Gilbert* made a \* general rule, that no exception should be taken to the officer's report on matter of practice but if any attorney would except, he should pay down and deposite five pounds out of his own pocket for every exception.

No exceptions are to be taken to a bare certificate; and exceptions are to be taken only to reports, that must be confirmed by the court, or special reports, because the court is to pass judgment on them; but the party who apprehends himself aggrieved, by such other reports, may move to discharge them. *Moseley's Rep.* 256.

If the plaintiff moves to confirm the master's report and the defendant shews for cause, that he has taken exceptions, the plaintiff may also except to the report, notwithstanding his motion. *Ibidem*, 305.

By the 51st general rule *pars*, all affidavits, certificates and reports, are to be entered, at least the day before the motion is made thereupon.

By the 43d rule *pars*, all exceptions to reports are to be set down to be argued by the attorney concerned, within four days after filing thereof, on such day as the officer shall appoint or on default of procuring the same, to be set down and argued, the same is to be disallowed by an order \* to be taken out of course, without motion.

The order for setting down the exceptions to be argued, is to be served on the opposite party, four days before the day of hearing.

\* This part of the rule, is altered by the present practice; for now the attorney for the party in whose favour the report is, moves the court, have the exceptions over-ruled, upon certificate that they are not set down to be argued.

### *Proces.*

For the further proceedings upon the several references and reports, in this court, see *Accounts, Proces of Contempt, Costs, Exceptions to Answers per Tot. and Pleadings.*

### *Rehearings.*

IT has been already said, that every order and decree, although pronounced on the hearing, is but interlocutory, until it be signed and enrolled, and may in that *interim* be altered by re-hearing, and sometimes by motion. See pa. 326. *Title Bill of Review.*

Every order and decree until signed and enrolled, may be altered by re-hearing, or by motion.

\* If either party apprehends himself aggrieved by a decree, in any matter, which was at issue in the cause, he may petition the court for a re-hearing; and with his petition he must produce a certificate, signed by the lawyers that were employed on the former hearing that the cause is proper to be re-heard, and the court will, at any time before the order is signed and enrolled, on counsel's motion, direct the cause to be re-heard.

\* 802  
Either party may petition for a re-hearing, and the proceedings thereon.

The party who would re-hear, is to give proper notice of the motion, and to deposit five pounds with the officer, and must also, in four running days after the motion for such re-hearing, pay five pounds more to the adverse party, to recompence him for his costs, if on such re-hearing no relief be had; and in default thereof, such re-hearing shall stand absolutely discharged, as if no re-hearing had been prayed, and the adverse party shall be at liberty to make up and enrol his decree.

The sum to be deposited on a petition for re-hearing, and the sum to be paid the adverse party.

If the party petitioning is relieved, he shall have back his money deposited.

The sum deposited to be paid back, if party petitioning be relieved.

But re-hearings do not seem to be a matter to which the party has an absolute right, but discretionary in the court, though they are seldom refused, when it is properly certified, that the \* cause is proper to be re-heard; unless the matter has slept a long time, or some other good cause appears.

Rehearing not a matter of right, and not granted, but on paying cost, or some other terms, and they are not usually granted, after any length of time.

A rule

\* 803

## Rehearing.

*Ibidem.*

A rule was made in the court of *Chancery* in this kingdom, the 7th *March* 1731, that no re-hearing shall be granted in two years after the cause was originally heard, or order made, against which the party would re-hear.

*Ibidem.*

In the case of *Troy* against *Tate* in this court, the 15th of *July* 1720, the defendant petitioned for a re-hearing, which was granted; but afterwards, the same day, plaintiff's counsel moved to set aside this order; and on debate it was ordered, that the defendant should pay the plaintiff, who was a *pauper*, thirty pounds, in a month, or the order for re-hearing to be discharged: And on the 19th of *November* following, on further debate, it was ordered, that the thirty pounds should be paid to the plaintiff, the first day of the next term, and to be re-heard the first hearing day; and if the thirty pounds was not then paid, the re-hearing to be discharged without further motion. This sum of thirty pounds, was over and above the deposite.

*Ibidem.*

\* 804

In the case of *Blake* and *Kirwan*, 21st of *February* 1722, the petition for re-hearing, was rejected, it being after a length \* of time, and in that case, it was said, that re-hearings were not *ex debito justitiae*, but matter of favour.

*Ibidem.*

And in the case of *Adair* against *McCormick*, the 24th of *July* 1739, the defendant petitioned for a re-hearing, which was granted, but on terms, that the defendant was to procure the outlawry to be reversed.

*Ibidem.*

\* 805

In *Chancery*, in the cause of *Killykelly* against *Lynch*, 23d of *January* 1744, the defendant petitioned for a re-hearing, after the cause had been heard on the master's report, exceptions and merits, and an issue directed, and it was ordered, that upon defendant's paying to the plaintiff, all the costs he had been put to in this court, and at law, since the pronouncing the decree to an account; the cause to be re-heard. And much the same rule was made in this court, in *Trinity term* 1749, in the case of *West* and *West* against *Houghton* and others. See also, the case of *Stuart* against *Maguin* in this court, 28th of *May* 1757, where it was determined on full debate, that the granting a re-hearing, as also the terms, on which granted, are entirely discretionary in courts of equity. And on this motion, the case of *Tenison* and *Delaney*, in the *Chancery* of this kingdom, was cited, where it had been lately so determined, and afterwards confirmed \* by the house of lords, of *Great Britain*, on an appeal.

## Rehearing.

If a re-hearing be ordered, the court upon an attorney's Cause if set motion, will grant an order for appointing the cause to be set down to be re-heard, the barons to be attended with the decree, the petition, and order for re-hearing, which are also to be produced to the court, on the re-hearing. Subpoena to hear judgment, not to issue on re-hearings.

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If a re-hearing be ordered, the court upon an attorney's Cause if set motion, will grant an order for appointing the cause to be set down to be re-heard, the barons to be attended with the decree, the petition, and order for re-hearing, which are also to be produced to the court, on the re-hearing. Subpoena to hear judgment, not to issue on re-hearings.

It is said, the court cannot alter the notes taken on hearing, but in the term the decree is pronounced in, but the party aggrieved must re-hear.

Notes not to be altered, but in the term the decree was.

\* Upon a re-hearing, any exhibit may be proved *viva voce*, as on the original hearing; but no proof can be offered of any new matter, without special leave of the court.

### \* 806

Exhibit may be proved, as on the hearing; but no new proof, but by special leave. Re-hearing not to stop proceedings, on a decree appealed from, without special order.

But the granting a re-hearing shall not stop or hinder proceedings, on an order or decree, appealed from, without the special order of the court, for the same. See 2d *Harrison's Chanc. Pract.* 3d Edit. 87.

In the case of *Rawlins against Powell*, 1 *Peer Williams*, 300, upon the plaintiff's petitioning to re-hear, Lord Chancellor declared, that the cause was open as to the whole, and every part of it, with respect to the defendant; while in respect to the plaintiff, it was only open, as to those parts complained of in the petition.

Party petitioning, shall have benefit only of the matter complained of, but the decree shall be open in the whole, as to the other party.

If a matter of fact be mistaken, at the hearing, &c. it is to be set right by re-hearing, and not otherwise. 2 *Har. Ch. Pract.* 86, 3d Edit. 1 *Cha. Ca.* 54.

Matter of fact, mistaken at the hearing, to be set right, by re-hearing.

The court will not re-hear a cause, after a decree has been signed and enrolled, notwithstanding the cause had been open, since the enrolment. 2 *Chan. Rep.* 2 *Har. Ch. Pract.* 3d Edit. 87.

The court will not re-hear a cause, tho' the decree has been open since the enrolment.

\* And note, the petition for rehearing is sometimes general, as to the whole decree; and sometimes the particular points,

\* 807 Petitions for re-hearings, sometimes general, and sometimes particular.

## Rehearing.

May be altered,  
or amended.

to which the party would re-hear, are set out in the petition; but in this last case, counsel must be very careful in setting out the points complained of, as the cause will be open only as to those points. But the court will give the party leave to alter, or amend the petition, at any time, before the cause is re-heard, and this was admitted by the court, in the case of *Napper* against *Croker*, in this court, Michaelmas term, 1754, although no rule was made on the petition, there being but two barons on the bench, and they having differed in opinion.—

May be preferred immediately after pronouncing the decree.

After hearing,  
and a decree, a  
bill may be for  
discovery, in aid  
of a re-hearing,  
either by the  
plaintiff or the  
defendant.

\* 808

In the case of *Judkin* against *Hickie*, in this court, the 25th of February 1757, it was insisted on by Mr. *Malone*, for the plaintiff, and agreed to by the court, that after a hearing and decree, a plaintiff may file a bill for discovery, in aid of a re-hearing, without leave of the court; though it was urged, by Mr. Solicitor General, on the other side, that, though a defendant might do so for \* discovery from the plaintiff, a plaintiff cannot do so against a defendant, as he had it in his power to introduce it in his bill at first, and make a proper use of it; and that if what Mr. *Malone* insisted on, was to be an established practice, plaintiffs may file bills *in infinitum*, besides, that as to the plaintiff, such a bill, by him, would stand upon the same footing with a supplemental bill, which cannot be filed without the leave of the court. Cases mentioned by Mr. *Malone*, were *Gainer* and *Gainer*, in *Chancery*, and *Healy* and *Milton*, in this court, 2 *Chan. Rep.* 142. The like was done in the case of executors, *Trotter* against *Boyle*, and the contrary in *Chancery*, January and April, 1755.

## Replication

## *Replication and Rejoinder.*

WHEN a full answer is in, and the plaintiff intends to Replication. proceed, he may forthwith file a replication.

And the replication is the contestation of the answer, and what must be filed, in order to put the answer in issue.

And replications are either general, or special.

Replications,  
general and  
special.

A general replication, is a reply, by the plaintiff, to the General replication, what, and answer of the defendant, and is an averring, or \* inforsing of cation, what, the allegations in the bill, and an avoiding, or denying the \* 809 matters in the answer.

A special replication, is only putting some part of the bill Special replication, what, and issue, and so much of the defendant's answer, to that part in what cases. of the bill; and in that case, witnesses are to be examined, only to those parts, and not to any other part of the bill, or answer; but a special replication very seldom happens, though, in many cases, it would be for the plaintiff's benefit, and not make the pleadings so prolix, as they generally are. *1 Har. & Prat. 3d Edit. 408.*

Or it is where a defendant, by his answer offers new matter, *Ibidem.* which will not be brought into issue, by the bill and answer; or where he denies only one, or some few points of the bill. *Ibidem.*

And if it be needful to prove but one, or a few particular points, the plaintiff ought to reply to those points only, on pain of costs; but the court generally orders costs at the hearing, as they think fit. *Ibidem.*

The replication affirms, and avers the bill to be true; and Replication what to contain. it is to be short, and must directly, and pertinently pursue the substance of the bill, and confess, and avoid, or \* traverse, \* 810 Not to depart deny the answer: and it must by no means be a departure from the bill. *Ibidem.*

A plaintiff having put matters in his replication, which were not contained in the bill, and which the plaintiff knew of, at the time of exhibiting the bill; the defendant pleaded and demurred to the replication, which the court allowed of. *Or defendant may demur, for Ch. Rep. 259.* the departure.

When

## Replication, &c.

No replication where defendant demurs.

Often necessary to reply, tho' plaintiff has no witness to examine.

Cause may be heard, on bill and answer, if subpoena to rejoin be not served,

When the defendant doth demur, or disclaim only to a bill, the plaintiff cannot reply. 1 Har. Ch. Pract. 409.

In many cases, tho' the cause requires no witnesses to be examined, yet it may be necessary for the plaintiff to reply, whereby the defendant will be put upon proof of his answer, and the plaintiff admitted to prove the matters of his bill: But if the plaintiff reply to an answer, and without rejoinder or rules, bring the cause to a hearing, the answer shall be taken wholly true, as if there had been no replication; for the opportunity which the defendant had of proving his answer, is taken from him. 2 Ch. Ca. 21.

And if the subpoena to rejoin, be not served, &c. though it be sued out, the cause may be heard on bill and answer.

\* 811 Dismiss for want of prosecution; how at the civil law.

By the ancient civil law, the plaintiff was to give security to prosecute his suit in two months, and if he did not, he was to be dismissed, and answer damages to the party; this begot the rule in courts of equity, that the plaintiff must reply within a limited time, and if he makes default, the defendant may move for a dismissal, with costs.

RULE. Time for replying, and dismiss, for want of a replication.

And in this court, by the 13th general rule, where a defendant hath fully answered a bill, and files his answer in term time, or in the four days after Easter term, or in the eight days after any other term, the plaintiff shall have the next following term, and to the end of the four, or eight days of the next succeeding term, to reply; and if the plaintiff will not in that time file his replication, then the defendant upon motion to be made on the last day, either of the said four or eight days, is to be dismissed. But if the answer be filed in vacation time, then the plaintiff shall have time to reply, to the sixth day of the third following term. And if the plaintiff, after the defendant hath been at the charge of taking out a certificate of no replication, in order to dismiss merely to prevent the same, shall put in a replication, then the \* defendant shall be first paid the cost of his certificate and may, if he will forthwith rejoin gratis thereto, and may move the court to enforce the plaintiff to go to a commission or in default thereof, that the defendant may have a commission ex parte, to such commissioners as the court, or the chief remembrancer shall appoint; or examine his witnesses before a baron.

If plaintiff replies, after defendant hath taken out a certificate of no replication, he is to pay costs.

\* 812 Defendant may compel the plaintiff to examine, or in default thereof, have a commission ex parte.

But not unless the plaintiff hath lapsed a vacation.

How defendant is to proceed, if it be an injunction cause.

But a commission ex parte shall not issue, unless the plaintiff hath lapsed a vacation, and the vacation after Easter term is not accounted one. But if it be an injunction cause, the defendant

fend

## Replication, &c.

Defendant may oblige the plaintiff to proceed by putting a rule on him, to dissolve the injunction.

In the case of *Lawrence* and others, against *Wheeler* and others, in this court, a bill was filed 25th January, 1681, and for replying, the 15th April, 1682, and the bill was dismissed, for want of a replication, the 17th day of December, 1682; so that the three terms were accounted inclusive, from the time of filing the answer.

The plaintiff hath four days of course to reply, after the defendant hath moved on the certificate, of no replication for dismiss; and if no replication be in these four days, the defendant may of course, and without serving the order issue a *subpæna*, for the whole taxed costs.

\* 813

After the *subpæna* hath been issued, and served, or even after an attachment hath issued for the costs, the court, upon motion of the plaintiff's attorney, will give the plaintiff leave to retain his bill, on paying the costs; and the cost to be paid in this case, is only the cost of the rule to dismiss the certificate, the cost of taxing, and the *subpæna* and service, and of the attachment, if it has issued. It was otherwise formerly, as it is now in Chancery) i. e. the costs mentioned in the *subpæna*, or attachment, must have been paid; but baron *Wainwright* altered it, as it now stands.

If after the motion, the plaintiff neglects to pay the costs, the defendant's attorney, may, on motion, obtain an order, that the plaintiff shall pay the same, and the cost of this last order, in four days after service, or that the defendant may be at liberty to proceed.

\* If the plaintiff pays the whole costs, before he moves to retain his bill, he must abide by it.

\* 814

If plaintiff pays the whole cost, before the motion.

By the 12th general rule, where a plaintiff prefers a bill, against several defendants, some of them answer, and some of them do not, and the plaintiff neglects to reply, to such as have answered, within the time limited, by the preceding rule, upon pretence that he cannot reply without the answers of the other defendants; in this case, such defendants as have not answered, or to be dismissed with costs, RULE. Plaintiff to reply to all the defendants, who have answered; tho', there be others who have not answered, or to be dismissed with costs, answered,

The court have had it under consideration, for some time past, to alter practice, and to have the order served. Then, if no replication be in four days after service, on an affidavit of such service, the officer to issue *subpæna*, for costs. But is not the *subpæna* a sufficient notice? and if so, would not this alteration rather multiply expence, to no purpose?

## Replication, &c.

Unless he hath effectually prosecuted the contempts against the others.

Or unless the defendants, who have not answered, be intitled to privilege of parliament.

\* 815

**RULE.**  
Plaintiff may dismiss his bill for discovery only, on paying every defendant 20s. costs.  
Or defendant may dismiss it, with taxed costs.

But if it be for relief, the plaintiff must pay taxed costs.

Plaintiff to pay the cost, on his dismissing his bill, or defendant may have it taxed, and issue a subpoena for it.

\* 816  
Dismiss set aside, where the bill was to be quieted, against frequent distresses.

On plea or demurrer allowed, bill to be dismissed.

answered, are to be dismissed with costs, upon motion, unless the plaintiff will make it appear, by a certificate from the chief remembrancer, that he hath prosecuted the contempts against the rest of the defendants, with effect.

But where there are several defendants to a bill, and that one or more of the defendants be entitled to privilege of parliament, if all the defendants have answered, except the defendant or defendants, entitled to privilege, the plaintiff may, in this case, (to prevent the defendants, who have answered, from dismissing his bill, for want of replication) move the court by his attorney, for time to reply, to such defendants as have answered, \* until the defendant, or defendants in privilege shall answer, and the court will grant it.

By the 14th general rule, where a bill is only for discovery and the defendant hath fully answered the same, if the plaintiff dismisses his bill within the time limited for that purpose by the aforesaid rule for replying, he may do so, upon paying every defendant that hath answered, twenty shillings costs; but if he neglects so to do, the defendant may, on certificate of no replication, and on motion thereon as aforesaid, dismiss the bill, and have taxed costs.

So that by this rule, it seems, that if the bill be for relief the plaintiff, on dismissing it, must in all cases pay taxed costs and so is the practice. But see *Title, Costs, and Dismiss.*

If the plaintiff dismisses his own bill, but neglects to pay the costs, the defendant must, in this case, obtain an order for the plaintiff to pay the costs, and also the costs of this last order, in four days after service thereof, or the defendant to be at liberty to proceed and tax the costs, and issue a subpoena for the same, which the court will grant, on motion of the defendant's attorney.

\* In the case of *Colson against Hyde*, in the high court Chancery, 1730, a dismiss, for want of a replication, was, on motion, set aside, this being a bill to be quieted against frequent distresses, on lodging the money in court, *in usum habentis*, and the plaintiff having an order for an injunction on bringing in his rent: The reason why the dismiss was set aside, was, because the plaintiff had already the effect of the bill, so that to reply, and bring the cause to a hearing, would be nugatory, as the court in such case, could give the plaintiff no decree.

Where a plea or demurrer is put into the bill, and the same allowed and proved, and the demurrer allowed, the bill is to be dismissed. See *Title, Demurrer and Plea.*

## Replication, &c.

One replication is sufficient to several answers in the same cause, by naming all the defendants therein, to which the plaintiff is advised to reply.

When the plaintiff hath filed his replication, and that the defendant is not under an obligation to rejoin *gratis*, he may forthwith serve the defendant with a *subpoena*, to rejoin; and upon affidavit of the service thereof, and upon motion of the plaintiff's attorney \* thereon, the court will make an order for the defendant to rejoin and join, in commission, in \* four days, and the defendant's attorney is to be served with a copy of the notes taken in court, (for no order is made out in this case, nor is the copy of the notes to be attested, but the plaintiff's attorney usually writes these words at the foot thereof, to wit, *Copy Notes*,) and the plaintiff's attorney, may at the same time, that he serves the rule to rejoin, serve the defendant's attorney with commissioners names, for the examination of witnesses, if he examines in the country, or with the names of witnesses, if he examines in town, and may in eight days, after leaving his commissioners names in the office, have at his own charge, a commission *ex parte*, without any further affidavit, or order, and proceed as before directed, by rule 19. *Title Interrogatories, &c.* pa. 581, and 583. Title *Interrogation, &c.*

\* 817

And this *subpoena* to rejoin, is in order to close the *litis contentio*, and is according to the old civil law, which \* required citation in order to form the act of the court; and therefore, the first citation was to answer; the second was to rejoin, upon which the probatory term was formed, and was previous to the examination of witnesses; and the third was the *subpoena*, or citation to hear judgment; but if the defendant delayed to appear upon the first citation, the court very justly might impose terms upon him to rejoin *gratis*, and that he should consent to form the probatory term without the service of a *subpoena* to rejoin.

The subpoena to rejoin is according to the old civil law.

\* 818

And the Civilians and Canonists held it absolutely necessary, *Ibidem*, that there should be a citation to the defendant, previous to the examination of witnesses, otherwise the *receptio testium* is absolute nullity, and the reason they give is, that the defendant, if cited, might either examine, or object to their credibility, or put such cross interrogatories to them, as might bring out circumstances in his favour, which he would not have an opportunity to do, if he were not cited; but it is not necessary for the defendant to appear, because the citation is

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In the case of *Dilarne and Lewis*, in this court, on a motion to set aside the officer's report, it was settled, that the four days are running days; and that the rule to rejoin may be entered immediately after service of the subpoena to rejoin, without waiting four days, as was formerly thought.

## Replication, &c.

in his favour, and he may renounce a privilege introduced in his favour. *Amator Rodriguez de form. prob. 196.*

If defendant is obliged to rejoin gratis, he is to be served with the rule.

\* 819

The time the defendant has to rejoin.

Defendant may, if he will, rejoin gratis.

On a general replication, if defendant lives above forty miles from Dublin, on affidavit thereof the court will give leave to serve defendant's attorney with subpoena to rejoin.

So, on a special replication, upon affidavit of defendant's living above fifty miles from Dublin.

\* 820

Rejoinder what to contain.

On a special replication, subpoena to rejoin must be served.

If plaintiff may put in a general replication after plea or demur-  
rer to a special replication allowed.

If the defendant be under an obligation to rejoin gratis, the plaintiff is to serve him with the order for that \* purpose, and if he doth not in four days after service thereof file his rejoinder, the plaintiff may serve his commissioners names, and proceed as is before directed. See *Title Interrogatories.*

For the time given the defendant to rejoin to the plaintiff's replication, and how the plaintiff is to proceed to speed his cause, in case the defendant should not rejoin or should neglect to rejoin in time, See *pa. (475) Title Hearing and pa. (581, 583) Title Interrogatories.*

When the plaintiff hath replied, the defendant may, if he will, forthwith rejoin gratis.

When the plaintiff files a general replication, if the defendant lives above forty miles from Dublin, upon affidavit thereof, and upon motion of the plaintiff's attorney thereon the court will order that service of the defendant's attorney with the *subpæna*, to rejoin shall be good service of the defendant; but this rule is generally entered of course in the office and note, this order is to be served on the attorney, at the same time with the *subpæna* to rejoin.

Twentieth of June 1743, it was ordered, That in all cases where a plaintiff files a special replication, that upon an \* affidavit filed, of the defendant's living above fifty miles from Dublin, and upon motion thereon, by the plaintiff's attorney that the service of the defendant's attorney with *subpæna* to rejoin, be deemed good service.

The rejoinder must pursue and confirm the answer; and must sufficiently avoid or traverse every material point of the replication.

Though a defendant should be obliged to rejoin gratis, if a plaintiff files a special replication, he must serve the defendant with a *subpæna* to rejoin.

After a plea, or demurrer to a special replication allowed the plaintiff may put in a general replication: *Sed quer. an* *vid. 1 Vern. 351*, where it was urged by counsel, that he may but the court refused to give any opinion.

T

## Replication, &c.

The plaintiff set down his cause to be heard on a bill and answer, and had a decree against the defendant by default, and plaintiff had leave to reply. On re-hearing, when the defendant came to shew cause against the decree, it was altered in his favour; the plaintiff petitioned to re-hear the cause, and at the re-hearing, prayed leave to reply to the defendant's answer, and had it, paying costs. *Mich. 1699,* between \* lord Donegal and *Warr*, 1 Har. Ch. Pract. 3d Edit. \* 821

In the case of *Rodney against Hare, et al.* *Moseley's Rep.* 296, Cause at issue by the replication; for the issue is offered by the defendant's traverse, and a rejoinder is only a fiction of the court, and is never actually filed.

Where witnesses have been examined, and no replication filed, the court at the hearing, or even after a decree, will order a replication to be filed, *nunc pro tunc*. *Ibidem*, and 2 *Vern. 46.* Replication may be filed after examination, and after a decree, *nunc pro tunc*.

In the cause of *Nicoll against Wiseman*, in *Easter term, 1688*, the cause came on to be heard the term before, and then the plaintiff had replied to the plea only, and not to the answer; and the court thereupon made an order, that the plaintiff should file a replication to the answer, *nunc pro tunc*, and that the cause should be heard this term: And the plaintiff now set down the cause for hearing again, without having given rules for publication, and had also amended his bill, and had not new served the defendants to answer; so the cause was again put off, as coming on irregularly. *Ibidem*. Where there is a plea and answer, and the plaintiff replies, the replication must be to the answer as well as the plea.

If, after the plaintiff hath filed a replication, he is inclined to have the \* cause heard upon the bill and answer, or would amend his bill, the court, upon motion of the plaintiff's counsel, on notice duly served, will give the plaintiff liberty to withdraw the replication; but to pay the costs of the rejoinder, if it be filed. A replication may be withdrawn, and the cause heard on bill and answer. \* 822

If the plaintiff replies, the defendant can never dismiss the cause, without hearing the cause; because he may rejoin *gratis*, and prove his answer, and so bring the cause to a hearing, as before directed, p. 498. Title *Hearing*. After replication, the defendant cannot obtain a dismiss, but on hearing the cause.

## Of Witnesses, Evidence, and Proof.

*What shall be admitted as Evidence, and will amount to sufficient Proof.*

Evidence in  
Chancery usu-  
ally by deposi-  
tions.

As to evidence, the usual course in *Chancery* is by depositions; for no witnesses *viva voce*, are allowed at the hearing, except by special order.

Depositions,  
how and by  
whom taken.

\* 823

And these depositions are at this day the testimony of the witnesses, *ore tenus*, taken down in writing by the examinators, or the commissioners: And this first writing is called the \* *minicles*, or paper draught, which, if the examination be in town, remain in the hands of the examinators; but if it be by commission in the country, they are returned with the commission to the court, and are filed in the chief remembrancer's office.

Attested copies  
of these deposi-  
tions, and of all  
the proceedings  
in this court,  
are evidence.

And the copies of these depositions are made out, and attested at the request of either party, either by the officer or by the examiners, as the case is, (which examiners, in this court, are the clerks to the several barons); and the copies of these depositions, so attested, as also the copies of all other the proceedings in this court, may be given in evidence; for the originals of these are supposed to be in themselves evidence: And by consequence, when a copy of them is produced on oath, or fully authenticated, you have full proof; because you have the proof of a matter which, if produced, would carry its own light with it, and by consequence would need no proof of it.

The difference  
between a copy  
by a person in-  
trusted for that  
purpose, and a  
person not so  
intrusted.

\* 824

But here a difference is to be taken, as to office copies, between a copy authenticated by a person intrusted to that purpose, for there that copy is evidence; and a copy, attested by an officer of the court, that is not intrusted to that purpose; for that is not evidence, without proving it actually \* examined: And the reason of the difference is, that where the law hath appointed any person for any purpose, the law must trust him as far as he acts under the authority that the law has given him; otherwise it would be to give credit, and not to give credit to him at the same time.

But

## Of Witnesses, &c.

But if an officer of the court, that is not intrusted to that purpose, makes out a copy, it must be proved that it was examined; because, being no part of his office, it is to be credited but as a private man's mere writing, or word, ought to be credited, without oath. See the *Law of Evidence*, by a late learned judge, p. 18, 19.

But the office copies of depositions, and all other the proceedings in this court, are of themselves evidence in this court, but not in any other, without being examined with the originals, and the attestation of them proved. And the same rule holds in this court, *vice versa*, as to the copies of pleadings or proceedings in other courts; for every court, for their convenience, have allowed their office copies attested, to be evidence in their own court, and have empowered their officers to make such copies as should be evidence; but the particular rules of one court are not taken notice of by others, and these copies may \* be read in all cases without producing the bill and answer.

A copy, made out by a person not intrusted, must be proved.

But the copies of all proceedings in this court, are of themselves evidence in this court.

The copies of depositions may be read, without producing the bill and answer.

\* 825

The proceedings in this court, no records, and why.

Although all these transactions in a court of equity be public matters, yet are they not of record; and the reason why they are not records, is, because they are not the precedents for office, and are founded only upon the circumstances of each private case, and the judgment there is *secundum equum & num*, and not *secundum leges & consuetudines*. *Co. Lit.* 260. a.

Now, not being records, they are not such memorials as are lodged inseparably in any certain place, but transferable; and therefore may themselves be given in evidence. See *Law of Evidence*, by a late learned judge, p. 37.—But note, where my pleading or proceeding is to be brought up to the court, an order should be first obtained for that purpose, which the court will grant on an attorney's motion.

The pleading or proceeding may itself be given in evidence.

But an order should be first obtained for bringing it up.

But though these depositions, or the defendant's answer are of themselves records, yet they are oaths in a court of record; and a witness swearing falsely there, may be prosecuted under common law, or on the statute, because it is a perjury in a court of record. *Ibidem*, 49.

Tho' these depositions, or a defendant's answer, be not records, yet a defendant, or a witness, swearing falsely, may be prosecuted for perjury.

When either of the parties, plaintiff or defendant, in the cause, would, upon the hearing thereof, make use of depositions formerly taken in another cause, in such cases, as by the rules of courts of equity they may, the court will of course, upon an attorney's motion, make an order for that purpose; always saving exceptions.

\* 826

The court, on motion, will give leave to use, on the hearing of the cause, depositions taken in a former cause, saving exceptions.

ons taken in a former cause, saving exceptions.

And

## Of Witnesses, &c.

**RULE.**  
And the parties are to have the benefit reciprocally.

And by the 40th general rule, when, upon motion of either party, plaintiff or defendant, the court doth order, that use may be made of any depositions, formerly taken in another cause between the same parties, (or those under whom they claim) touching the matter in question, it is thereby intended, that the other party have the same benefit of the depositions; and both parties have liberty of their lawful exceptions at the hearing, to any of the said witnesses formerly examined. See 1 Ch. Ca. 175.

But this rule to be understood between plaintiffs and defendants only.

\* 827

But note, It is said, that this rule of reading depositions, formerly taken in another cause between the same parties, is to be understood to be between plaintiffs and defendants only; for when there are several defendants in a cause, and that they, or any of them, examine witnesses in that cause, such depositions shall not be used by one of \* those defendants against any of the other defendants, in any after cause between them, relative to the same matter.

Depositions in a former cause, in which the matters in question were in issue may be read in evidence.

But depositions in a suit between other parties, are not to be given in evidence.

The advantage ought to be reciprocal.

There being the same question in both causes, and defendant's defence being the same, the depositions in a former cause shall be read against him: But depositions in another cause, in which the matters in question were not in issue, shall not be read. *Treatise of Equity*, p. 123.

So depositions taken in a suit between other persons, are not to be given in evidence; for he had no opportunity to cross-examine the witnesses. *Ibidem*, and *Hard. 472.*

But cannot be used against one who does not claim under the party against whom they were taken.

So depositions, taken in a cause where the plaintiff's father was a party to the suit, being in all matters the same, his father being only tenant for life, those depositions could not be read against him; for the advantage ought in all cases to be reciprocal. 1 Vern. 413.

But depositions, taken in a former cause, cannot be read in another cause, against one who does not claim under the party against whom the depositions were taken. *Ibidem*, and 1 Ch. Ca. 73.

\* 828  
Where a legatee may have the benefit of depositions taken in a suit by a former legatee.

\* But if a legatee brings a bill against the executor, and proves assets, another legatee, though no party, may have the benefit of these depositions. 1 Vern. 413. 2 Vern. 447.

## Of Witnesses, &c.

In the case of *Nibbet against Daniel*, *Bunb. Rep.* 310, it was declared by the court, that if a cause be brought to a hearing, and there is an objection for want of parties, and the court lets the cause stand over with liberty to the plaintiff to add a party; if that party is a *material defendant*, and concerned in interest, the depositions taken before cannot be read against this defendant, he not being a party when issue was joined, and the commission executed. And note, at the foot of the case there is a *quere*, What method is to be taken, since there can not be an examination *de novo*, as publication was passed?

General rule,  
that depositions  
cannot be made  
use of against a  
person, not a  
party to the  
suit.

\* 829

So that the *general rule* in courts of equity seems to be, that a deposition cannot be given in evidence against any person, who was not a party to the suit; nor shall he be allowed to give it in evidence; for if he cannot be prejudiced by the deposition, he ought not to be benefited by it; for then he might use all the depositions that made for him, while those which made against \* him could not be made use of by the other side. *Hard. 472.*

But depositions were admitted to be read in *Chancery*, thirty years after they were taken, though the parties were not the same, inasmuch as the cause related to the same land, and the ter-tenants were parties to it; and this is an indulgence of the *Chancery* beyond the strict rules of law, and is admitted for pure necessity, because evidence should not be lost; besides, the *Chancery* hath great faith in its own examinations. *i Ch. Rep. 75.*

But depositions  
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In the case of *Peter Delamar against Mary Delamar*, in *Chancery*, *Trinity term, 1759*, it was debated, if depositions, which had been taken in a former cause, wherein one *Garret Delamar* was plaintiff, and the said *Mary Delamar* and others were defendants, and the plaintiffs in the present cause no party, should be read as evidence for the plaintiff.—It was objected, on the behalf of the defendant *Mary Delamar*, that, as the plaintiff was not a party in the cause, in which the depositions are taken, the defendant could not read them against the plaintiff, and the benefit would not be reciprocal. To this it was answered, by the counsel for the plaintiff, that it was not absolutely requisite, on such applications as these, \* that the advantage should be reciprocal; and instanced the case of *Archdall against Morrison*, in this court, *Easter term, 1752*: And so the court seemed to think, but, that in the present case it appeared, that the title was the same with that of the plaintiff, in the cause in which the depositions were taken, they both claiming under remainders in the same settlement; and *Mary Delamar*, the defendant in the present cause being the same person as in the cause wherein the depositions were taken, and had an opportunity to, and did cross-examine:

Depositions in a  
former cause  
shall be read on  
the hearing of  
a subsequent  
cause, tho' not  
between the  
same parties, if  
the title be the  
same.

\* 830

Besides,

## Of Witnesses, &c.

Besides, the present bill was an original bill, in the nature of a bill of revivor, praying, that all the former proceedings may stand revived, by which the plaintiff had bound himself; and by the plaintiff's reading the said depositions, the defendant had an advantage; for she was thereby intitled also to read the depositions in that cause. Lord Chancellor, for these reasons, was clear of opinion, that the proofs in the former cause were proper to be read in this cause.

Depositions in one cause may be used in a cross cause, without motion.

Depositions in the original cause, may be used in a cross cause, without motion. And where one party obtains an order, the other may use the same, without motion. *2 Har-rison's Chan. Practice*, 3d Edit. 52.

### \* 831

An agreement proved in the original cause, but not in issue, and in issue in the cross cause, but not proved, ordered, that the same depositions should be read in both causes.

When depositions in a cause dismissed shall be used.

\* In cross causes, an agreement was proved in one of the causes; and in that case it was not set forth in the allegations of the bill or answer. In the other cause, it was set forth in the bill, but not proved in the cause; and an order was obtained before publication, that the same depositions should be read in both causes. And by the better opinion, this might be; for, since the order was before publication in the second cause, the defendant had liberty to cross-examine; and the sight of the depositions were for his own advantage. *1 Ch. Rep.* 236.

Where a cause is dismissed, the matter of it not being proper for equity to decree, yet the depositions on a fact in the cause may be used as evidence, whenever it shall come in question again in a new cause between the same parties.

*Ch. Ca.* 175. *1 L. Raym.* 735.

And when not.

But when a cause is dismissed, not upon this ground, but for irregularity, so that in truth there was never regularly any such cause in the court, and, consequently, no proofs, those proofs cannot be used; for proofs cannot be exemplified without bill and answer; nor can they be read at law, unless the bill, upon which they were taken, can be read. *1 Ch. Ca.* 175.

### \* 832

All depositions to be taken in a court of record, and each party *may read any part, and the whole.*

\* No depositions ought to be allowed which were not taken in a court of record, and they are like examination of witnesses, so that although the defendant may read what part he will; yet the other side may read the whole afterwards. *Treatise of Equity*, 123.

If a witness dies before he signs his examination, the depositions cannot be made use of.

Where a witness dies after examination, but before such examination is signed by him, the depositions cannot be made use of, for the examination is not complete until it is read over, and signed by the witness; as he may at any time before he signs it amend or alter it. *1 Williams* 414.

But

*Of Witnesses; &c.*

But yet, where the defendant after publication examined witnesses, and conceiving himself irregular in such examination; on the usual affidavit, that the defendant, his clerk, or solicitor had not, nor would, see any of the depositions, he or an order to re-examine this witness, but the witness died before a re-examination, and the court gave leave to the defendant, to make use of the former depositions of the same witness. *Ibidem* 415.

In the case of *Coker against Farewell*, Hilary term 1729, before lord chancellor King and the Master of the Rolls, a witness who had been examined at a former trial of an issue, between the same parties, and had been examined in the cause, died, and it was held, that not only his depositions may be read, upon a new trial, but what he swore at the former trial, may be given in evidence against the same parties. *2 Williams* 63.

But upon an irregular examination, if the witness dies before he can be re-examined, after an order for that purpose, the former depositions shall be read. The evidence of a witness at a former trial of an issue, and also his depositions in a cause between the same parties, may after his death be given in evidence at a new trial.

\* 833.

In *Moseley's Reports*, 118, Hilary 1728, at the rolls, it was determined, if a witness is examined in this court, you may read without any order, any other depositions of the same person, in the spiritual court, or elsewhere, in any other cause, so that you make use of them only to confront the evidence he then gives.

A witness being examined *de bene esse*, died before any replication filed, or examination in chief; the court, on motion of the plaintiff's counsel, ordered these depositions to be read as evidence, at a trial at law; notwithstanding the defendant's answer was put in above five weeks before the defendant died, or, that otherwise, an examination *de bene esse*, would be to no purpose. *1 Vern.* 331.

In the aforesaid case of *Delamar against Delamar*, in Chancery, Jan. 1759, an ejectment being brought at law, upon the title, a bill was filed in this court to remove temporary bars, and for liberty to give in evidence upon the trial, depositions that had been formerly taken in a cause, which had been commenced by one *Garret Delamar*, deceased, against the same defendant, and no other relief was prayed by the bill: The cause was heard, and it was decreed that all temporary bars should be removed; but as the title was merely at law, and the trial not directed by the court of Chancery, nor in any sort, consequence of any order of the court, his lordship would make no order, as to reading in evidence, the depositions on the trial at law.

Depositions of a witness in another cause, or court, may be read against him, without order to shew the inconsistence of his evidence. Depositions of a witness examined *de bene esse*, he dying before he was examined in-chief, ordered to be read at a trial at law.

\* 834.

In

## Of Witnesses, &c.

In the debate, the case of *Sharp* and *Maxwell*, in the said court, was instanced by the counsel for the plaintiff; but in that case, general relief was prayed in the bill, here only special relief, and the bill in that case was retained, with liberty to try the title at law, and there were also several special circumstances attending that case, not in the present.

And his lordship also said, that a court of equity, the title being at law, will not interfere with the court of law, whether the depositions be legal evidence or not.

\* 835  
The bill in Chancery, evidence against the plaintiff.

\* The bill in *Chancery* is evidence against the plaintiff, for the allegations of every man may be supposed true against himself; nor shall it be supposed to be preferred by the counsel, or solicitor, without the party's privity; and if the counsel hath mingled it with any fact, that is not true, the party may have his action. 1 Sid. 221. 1 Vent. 66.

Bpt not unless there be proceedings upon it.

But where a bill is exhibited, and there are no proceedings upon it, it cannot be evidence, unless it be proved it was exhibited with privity; for any one may file a bill, in another's name, to rob him of his evidence by a sham concession; and it is unreasonable to suppose the party filed it, when there are no proceedings on it, for then the filing would be to no purpose; and it is more likely to be done by a stranger to prejudice him. 1 Sid. 221. 1 Ch. Rep. 651. 1 Ch. Ca. 64.

How far it stands in point of credibility.

\* 836

The answer stronger evidence against the defendant, because on oath.

But the whole must be read.

In some special cases the answer of one defendant may be read against another.

This is accounted to stand in point of credibility, in the same circumstances as a confession by letter under the party's hand though no body saw the writing of it; though some have ranged it in an inferior degree, because one is the party's own immediate confession, and the other is only a counsel's draft; yet it seems, the allegation in \* a court of justice, that amounts to the confession of any fact, ought to have more weight and authority with it, than any private owning. See the *Law of Evidence*, by a late learned judge, 38.

And if the bill be evidence against the complainant, much more is the answer against the defendant, and carries still a higher weight of probability along with it, because on oath. Goldby, 326.

But when you read an answer, the confession must be all taken together; and you shall not take from thence what makes against the defendant, and leave out the rest, but the whole. 5 Mod. 10.

Regularly, the answer of one defendant shall not be made use of, as evidence against another defendant; but one defendant saying, by his answer, that he was much in years, and could not remember the matter charged in the bill, but the

## Of Witnesses, &c.

J. S. was his attorney and transacted this matter, and J. S. being made a defendant, and giving an account of the matter here, upon motion for an injunction, lord Cowper said, these words in the first defendant's answer, amounted to a referring to the other defendant's answer, and for that reason, the attorney's \* answer ought to be read, and accordingly was read against the first defendant. *1 Peer Williams*, 301.

\* 837

It was agreed *per cur.* that the answer of a superannuated defendant, put in by guardian, is to be read against him as an answer of one of full age, put in, in person: And a difference was taken between such an answer, and that of an infant, put in by guardian; because an infant improves and mends, as lord keeper said, and therefore is to have a day to new cause after he comes of age; but the other grows worse, and is to have no day. *Preced. in Cha. 229.* Sir Richard Lange against lady Caverly and others.

Confessing a matter by answer, is sufficient evidence against the party. *2 Vern.* 380.

Confession by answer sufficient against the party.

A bill was brought by creditors, against an executor for an account of the personal estate; the executor set forth by answer that there was one thousand one hundred and sixty pounds left by the testator in his hands, and that coming after to make up accounts with the testator, he gave a bond for one thousand pounds, and the rest was given him as a free gift for his trouble in the testator's business, and no other evidence in the case, that the money was deposited, but the \* executor's own oath; argued, that the answer though it was put in issue, should be allowed; since there is the same rule of evidence in equity, as in law, and if a man was so honest as to charge himself where he might roundly deny it, he ought to find credit, where he swears in his own discharge.

In what case a defendant may charge and discharge himself by his answer at the same time.

\* 838

But it was answered, and resolved by the court, that when an answer was put in issue, whatever was confessed and admitted, need not be proved; but it behoved the defendant to make out, by proof, whatever was insisted on by way of avoidance; but with this distinction, where the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, there he ought to prove the matter of his defence; because it may be probable, that he admitted it out of apprehension, that it might be proved; and therefore such admission ought not to profit him so far as to pass for truth, whatever he lays in avoidance. But, if it were one fact, as if he had said, the testator had given him one hundred pounds, it ought to be allowed, unless disproved; because nothing of the fact charged is admitted, and the plaintiff may disprove the whole fact as sworn, if he can: But it was urged, that here the probability was on the defendant's side, because he did

## Of Witnesses, &c.

\* 839

did not give a bond for this sum, as for the residue; but the Chancellor said, there was some \* presumption in that, but not enough to carry so large a sum, without better attestation. See the *Law of Evidence*, by a late learned judge, 39.

A man's voluntary affidavit is evidence against him, but the proceedings, on which it did arise, must be given also in evidence.

Analogous to this, is a man's own voluntary affidavit, which is evidence likewise against him; but then the proceeding must be likewise given in evidence, on which this affidavit did arise; and the reason why the proceeding must be also given in evidence is, to prove the identity of the person; for to prove an affidavit sworn, is not sufficient, for the party may be personated; therefore, to ascertain this, the occasion of the swearing must be proved; for it is not to be thought, or supposed, that any man, without some occasion, would make an affidavit. *Ibidem.*

Difference between the evidence of an affidavit, and of an answer.

But there is great difference between the evidence of an answer, and that of a voluntary affidavit. *Ibidem.*

An answer cannot be given in evidence, without producing the bill, unless the bill be lost.

\* 840

Although depositions may be read, without producing the bill and answer, yet an answer cannot be given in evidence, without producing the bill; for without that, there does not in this case appear to be a cause depending, which must be presumed, if depositions be taken; but if there be proof by the proper officer, that the bill hath been searched for, and cannot be found, there \* the answer hath been allowed to be read, without a sight of the bill: And this the lord chancellor Brodrick allowed, tho' the loss of the bill was not proved by the proper officer, but by a clerk only, who wrote in the office, and swore he had searched carefully with the officer, and could not find the bill. Michaelmas term, 1714, in Chancery, *Roch and his wife against administrators of Howard*. *Ibidem.*

42.

Answer, how proved.

An answer is proved, by shewing the allegations in court, by shewing the bill which is the charge, and the answer, which is the defence to the bill; and this, in civil cases, shall be intended to be sworn, because the proceedings in such defence are upon oath. *Ibidem.*

It is to be taken as an oath, without further proof than from the proceedings in the cause.

Now, since the proceedings in any court of judicature within the kingdom are good evidence in other courts, and the proceedings in this case are upon oath, it follows, that in all civil cases, the answer is to be taken as an oath, without further proof than from the proceedings in the cause. *Ibidem*, 43.

## Of Witnesses, &c.

But a voluntary affidavit is not part of any cause in a court of justice, and therefore must be proved to be sworn; for if affidavit is not part of any cause and therefore must be proved to be sworn; it is like a note or letter.

\* 841

The second difference between them is, that the copy of an answer may be given in evidence; but not of a voluntary affidavit, which hath no relation to any court of justice, and therefore not intitled to public credit; but, being a private matter, must be itself produced as the best evidence. 3d Mod. 36.

But the voluntary affidavit of any stranger can by no means be given in evidence, because the opposite party had not the liberty of cross-examining. Sty. 446.

From what has been said, it is evident, that a voluntary affidavit is no evidence between strangers, because there is no cross-examination; nor can there be, there being no cause depending; and therefore such evidence cannot be admitted. *Ibidem.*

That a man's answer in the spiritual court, or voluntary oath before a justice of the peace, may be read as evidence against him in Chancery, by order. 1 Vern. 53. *Quære*, should there be notice?

A man's answer in the spiritual court, or oath, before a justice of peace, evidence against him.

\* In the case of *Rawlinson against Hutchins*, 2 Vern. 283, there being a decree to an account; and as to one article of account, there being but a single witness against the defendant's oath, the court declared it was not sufficient evidence to decree against the defendant; and the plaintiff having had the benefit of the defendant's oath, they would not send to be tried at law, where one witness is sufficient, although was insisted by the defendant's counsel, that it might be tried at law. And, see 1 Vern. 161. 2 Vern. 283; *Proceedings Chan.* 19; and 3 Ch. Ca. 223.—*Sed quære*, if there be other circumstances to corroborate the testimony of the witness, where the answer of the party appears to be notoriously falsified in other particulars, or if manifest acts of fraud appear in the case, on the part of the defendant? Ayl. 69.

\* 842

But in the *Law of Evidence*, by a late learned judge, p. 94, is said, the court may direct a trial at law to try the credibility of the witness; for that it is fit, where there is but one witness only in counter-balance to the defendant's answer, and that one witness the decree is to be founded, that the court should

But will direct a trial, as to the credibility of the witness.

## Of Witnesses, &c.

\* 843

should inform their conscience of his credibility, by a trial at law; otherwise any profligate's oath may overturn \* a man's right, without any opportunity to object to his credibility. But when there are two witnesses against the answer, then there is so great an over-balance of credibility, that the plaintiff ought not to be delayed in a trial at law.

**Settlement of a jointure before marriage, evidence, that all former treaties were resolved into it.** A settlement of a jointure, actually made before marriage, is an evidence, that all the precedent treaties and agreements were resolved into that. *1 Vern. 369.*

**A third mortgagee, buying in the first, need not prove the money paid; an acquittance for it will be sufficient.**

A third mortgagee buys in the first, and brings a bill to foreclose the second, if he doth not pay both; he need not prove the money actually lent on the third, the producing the deed or acquittance being sufficient evidence. *2 Vern. 279.*

**The injured party's oath allowed as evidence in odium spoliatoris.**

**Several cases, in which slender evidence is required.**

Where a man had run away with a casket of jewels, the injured party's oath was allowed as evidence in *odium spoliatoris*. *1 Vern. 207, 208.*

A slender evidence will be sufficient to prove livery of seizance, attornment, assent to a legacy, or the new publication of a will. *Ibidem, 330.*

**Ibidem.**

\* 844

The evidence of a servant, who was only nine years of age at the testator's death, but lived three or four years afterward in the house, was \* allowed to prove the furniture then standing, thirteen years after, though she had never taken any memorandum of it. *Davey and others against Leys, Michaelmas term, 1728. Moseley's Rep. 72.*

**Legacy presumed paid after a length of time.**

A legacy is presumed to be paid, after a great length of time. *2 Vern. 21.*

**Words no evidence against a deed.**

Words are no evidence against a deed solemnly executed. *1 Williams, 482.*

**Exhibits proved by depositions, to be shewn at the hearing.**

And, although all exhibits, proved by the depositions, may be read at the hearing, yet they must be shewn forth in court, if the party will have any benefit of them. *Treatise of Equity, 123.*

**Parties and privies must shew the original deed. But strangers may plead it, without shewing it.**

And the parties and privies ought to shew the original deed for every deed ought to prove itself, and be proved by others. But strangers to the deed, and who do nothing in right of the grantee, as bailiff, or servant, may plead the patent or deed without shewing it. *Ibidem, 124.*

## Of Witnesses, &c.

So a will, which is the plaintiff's title, must itself be shewn in what cases to the court, and not a copy only; otherwise, where it is by way of circumstance. *Ibidem.*

\* But where a deed, or other evidence, is suppressed, the court will always intend a title against him that suppressed it. But a copy of a deed, supposed to be suppressed, is not allowed, unless examined; nor even upon an affidavit, that the plaintiff had got it; but he shall be left to recover it at law. *Ibidem.*

\* 845 A deed or other evidence suppressed, the court will always suppose a title. But a copy of the deed not allowed, unless examined.

So formerly, although a recital of a lease, in a deed of release, was good evidence of such lease against the releasor, and those that claim under him; yet, as to others, it was not, without proving there was such a deed, and that it was lost or destroyed. *Ibidem.* ——But now, by statute 9 Geo. 2d. Ch. 5. it is sufficient evidence of such lease, in all cases.

And in case of an inrollment for safe custody, the deed may be said to be recorded; but it is no record. And a copy of it is no evidence; nor is the inrollment itself, without particular circumstances to support it, or proving, that the original deed was in the defendant's custody, or power, or accidentally lost, &c. So determined in the case of *Spence against Combe*, 2 Vern. 71. 591, and afterwards confirmed upon a re-hearing. But on issue at law being directed, whether such deed \* was executed, upon the trial, a copy of the deed was allowed to be read, and a verdict for the deed, though it was objected, it was not a bargain and sale, so did not operate by the inrollment.

How the copy of a deed enrolled shall be considered as evidence here, or at law.

But where a bargain and sale was inrolled, pursuant to the statute, the inrollment is a record, so that a copy of it may be read in evidence, for no rasure or interlining shall be intended in a record, for the height and solemnity of it, but the sure way is to exemplify it, under the great seal, or at least under the seal of the court. See the *Law of Evidence*, by a late learned judge, 71, 72.

No letters or notes not proved shall be used; but records Letters, notes, upon motion, may be proved *viva voce*, in court. *Ibidem*, and records, 3.

If husband and wife contradict, the depositions ought to be suppressed. *Ibidem*, and Ch. Ca. 302.

Shop books have sometimes been read at the hearing, and sometimes depositions in the Admiralty. 1 Ch. Ca. 306.

A man's

S

## Of Witnesses, &c.

A man's book  
of accounts.

A man's book of accounts is evidence against him, not for him. 2 *Har. Ch. Pract.* 3d Edit. 53.

\* 847  
Parish books.

\* Parish books, or church books, no evidence. 2 *Har. Ch. Pract.* 53.

No deed to be  
read on the  
hearing, except  
issue be joined.

How wills, by  
which lands,  
&c. are devised,  
are to be execu-  
ted.

It is said, that no deed will be admitted to be read, on the hearing in any cause, where issue is not joined.

By statute 7 *Will. 3, Ch. 12, S. 5.* All devises of any lands, tenements, or hereditaments, deviseable either by force of the statute, or by any particular custom, shall be in writing; and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed, in the presence of the devisor, by three or more credible witnesses, or else they shall be void.

Devises of lands,  
&c. in writing,  
not revocable,  
but by other  
will, &c. in  
writing.

And by sect. 6, no devise in writing of lands, or hereditaments, shall be revocable, otherwise than by some other will or codicil, in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises of lands, and tenements shall remain in force, until the same be burnt, cancelled, torn, or obliterated, by the testator, or his directions in manner aforesaid; or unless the same be altered by some other \* will or codicil, in writing, or other writing of the devisor's signed in the presence of three or more witnesses, declaring the same.

\* 848  
What proof is  
requisite, of the  
execution of a  
will of land.

Declared by lord chancellor *Cowper*, in the case of *Longfellow against Eyle*, that the proper way of examining a witness, to prove a will, as to lands is, that the witness should not only prove the executing the will by the testator, and his own subscribing it, in the presence of the testator, but likewise, that the rest of the witnesses subscribed their names, in the presence of the testator, and then one witness proves the full execution of a will, since he proves that the testator executed it, and likewise, that the three witnesses subscribed it in his presence. 1 *Will. Rep.* 741.

If the witness  
swear he sub-  
scribed it in the  
same room, and  
at the testator's  
request, held  
good, tho' not  
said to be in  
the testator's  
presence.

And his lordship held, that the bare subscribing the will, by the witness in the same room, did not necessarily imply it to be in the testator's presence; for it might be in the corner of the room, in a clandestine, fraudulent way, and then it would not be a subscribing by the witness, in the testator's presence; but, if it be sworn by a witness, that he subscribed the will, at the request of the testator, and in the same room, this cannot be fraudulent, and is sufficient. *Ibidem.*

## Of Witnesses, &c.

\* 849

And in the same case, his lordship declared, that when a power is given to appoint the uses of land, by deed or will, or other writing, in nature of a will, the will must be intended such a one, as is proper for the disposition of land, consequently, must be subscribed by three witnesses, in the presence of the testator; for this is within all the inconveniences, that the statute of frauds intended to prevent; and the other words "in the nature of a will," mean the same as a will, which must be subscribed by three witnesses, in the presence of the testator. *1 Will. Rep. 741.*

A will, attested by two witnesses, not a good appointment of an use of land, pursuant to a power.

## Of the Sufficiency and Disability of a Witness.

\* 850

AS it is not sufficient to have a right in equity, unless we can make it appear, by some outward proof to the court; in order to obtain relief, it will be necessary to treat also of the qualification of witnesses, and the nature of evidence and proof: Not that it is meant, to speak of these in general, but so far as they are used in a court of equity. Now in determining the qualification of witnesses, equity follows the law; and it seems the chancellor cannot do otherwise: And therefore, if man be rendered \* infamous in law, as by an infamous judgment, or has not discretion and understanding, &c. his testimony is not to be admitted. And the cases where the party concerned in interest, though never so small, have usually prevailed, unless in special instances. As 1st for the necessity, where no other evidence could possibly be had; as where a man tears a note, or a goldsmith's apprentice over-pays a bill of exchange. 2d. *In fidium spoliatoris*, the oath of a party imputed shall be a good charge on him who did the wrong. 3dly, after great length of time; as in an account of twenty years standing, he may prove by oath, what he cannot prove otherwise. 4thly, Of small sums in an account, as under 40s. he shall be discharged by his oath, but he shall not charge another so; and this rule extends no further, than for the sum of 40s. and he must mention to whom paid, for what, and when; for in an account he must prove the particulars. 5thly, Where he has released his interest, though the release was sealed in court, while the cause was trying. 6thly, *Particeps iniurias*, is admitted to prove matters of fraud, especially, where what he proves is to his own prejudice. 7thly, If one be made a defendant, by covin to take away his testimony, and appears upon the evidence, the judges may, and ought to allow him to be a \* witness: And this cannot be a general rule, but every case stands on its own circumstances, that is

\* 851

## Of Witnesses, &c.

their interest is so great, as it may be presumed, to make them partial or not; and therefore alms people, and servants, are good witnesses; so it is usual for a legatee of a small legacy, as 5s. to a private person, or 5l. to a nobleman, to be admitted a witness, for the will. See *Treatise of Equity*, 121.  
123.

### Exceptions to witnesses.

### Voir dire, the explanation of it.

Exceptions against witnesses are, if they gain, or lose by the success of the cause, or are under any apprehension, or imagination of gaining or losing; a witness shall not be admitted to swear in exoneration of himself, but a witness may swear against himself.

When a witness gains by the success of a cause, if it should be for the party he is produced for, or if he loses, if it goes against him he is produced by, then he is an incompetent witness; but should the witness lose, if the party he is examined for, succeeds; he is a good witness; for no witness can be supposed to have any temptation to swear contrary to the truth, against his own interest. And when a witness thus examined, as to being interested or not, it is termed examining, as to *voire dire*, which signifies to speak, or say the truth.

\* 852

Counsel or attorney, may be examined, as a witness, but to be first examined.

\* A counsel or attorney, may be examined as a witness, but he must be first examined, before any other witness examined.

To answer only as to their own knowledge, not what was revealed by their client.

If the adverse party will produce the counsel or attorney against his own client, they ought to answer only what they know of their own knowledge, not what was revealed to them by their client, for a greater regard should be had to publick justice, and to publick good, than to private interest.

In such case, the counsel or attorney, must take the general oath, but may demur to an interrogatory which would lead him to discover any secret revealed to him, by his client.

In the case of *Magill* and his wife, against *Savage* and others in this court, 3d December, 1741, Mr. *Trevor*, an attorney for one of the defendants, was produced as a witness, by the plaintiff, on a commission; he refused to take the general oath administered to witnesses, imagining, that he would be thereby obliged to answer every interrogatory exhibited to him, and by that means, disclose what was revealed to him by his client, and insisted that the commissioners should swear him particularly, to answer only to such things, as were not revealed to him by his client. Lord chief baron *Marlay* said, Mr. *Trevor* should have taken the general oath, and that he might have demurred to such interrogatories, as led him to discover the secrets of his client, revealed to him by \* his client, and the court attached him, (although he made affidavit, that what he did was through ignorance,) as it might have been a mis-

\* 853

## Of Witnesses, &c.

manifest prejudice to the plaintiffs, in hindering them from setting down their cause to be heard.

A party interested, by releasing his right may be a witness; but it must appear by proof in the cause, that such witness hath released his right. *2 Vern.* 375. And the depositions of a witness, who was examined before the hearing, and afterwards on the account, having first released his right, were allowed to be read. *2 Vern.* 473. *Preced.* in *Ch.* 234.

A party interested, by releasing his right, may be a witness.

A person disinterested when examined, becoming interested afterwards, yet his examination may be made use of, though he should afterwards become a plaintiff in the cause; but these depositions cannot be made use of at law; for there is a rule of law, that where a witness is living, and may be produced at the trial, the depositions of such witness shall not be read. *2 Vern.* 669. *1 Williams,* 288.

A person disinterested when examined, and afterwards becoming interested, his examination may be read But not at law.

A legatee of a small legacy, as has been said before, may be a witness for the will. *1 Vern.* 254. *Sed vid.* *2 Vern.* 317, where it is said, that none can be a witness, where his interest is \* concerned, be it never so small or minute. But the law in this respect, has been much altered, by a late statute, made in the 25th year of the reign of his present majesty, which see at the end of this chapter.

A legatee of a small legacy, may be a witness. *Sed quær.*

\* 854

Where it is proved to the court, that a witness is a party interested, no proof is to be admitted, to shew him to be disinterested. *2 Vern.* 464.

Witness proved interested, no proof admitted to the contrary.

A wife cannot be examined against her husband, unless in case of extreme necessity. *2 Ch. Ca.* 39. *2 Vern.* 79.

Wife not to be examined against her husband.

A commissioner may be a witness, but then he ought to be examined, before any other witness be examined. *1 Vern.* 369.

A commissioner may be a witness.

In a suit to set aside a hard award, the arbitrator or umpire, who made the award, may be examined as a witness. *1 Vern.* 157, 158.

An arbitrator, or umpire, may be a witness.

An executor may be admitted to prove the revocation of a legacy, though he has proved the will. *1 Vern.* 20.

Executor may prove the revocation of a legacy.

A grantee, when he appears to be a bare trustee, is a good evidence, to prove the execution of the deed to himself. *1 Williams,* 290.

A grantee, a bare trustee, may prove the deed.

\* A member of a corporation cannot be a witness for the corporation. *1 Vern.* 254, and per lord keeper, a corporation ought to have a town clerk, and under clerks that are not freemen, that they may be competent witnesses upon occasion.

\* 855  
A member of a corporation cannot be a witness for the corporation.

## Of Witnesses, &c.

But may, if  
disfranchised.

In 1 Will. 595, it is declared by lord chancellor Parker, that if a corporation will examine any of their members, as witnesses, they must (and so the course is) disfranchise them; and then they make use of their testimony. Note, the method of disfranchising, is by an information, in the nature of a quo warrant against the member, who confesses the information, on which the plaintiff obtains judgment to disfranchise.

An inhabitant of the parish, not to be a witness, in a suit touching money, given to the parishioners. But a lodger, that doth not pay to the poor may.

Cross-examining by one side, makes a good witness for the other.

\* 856

Plaintiffs cannot be examined for each other, but defendants may.

Where there is a dispute touching money, given to parishioners, none of the inhabitants of the parish ought to be witnesses; because they are interested, as being eased in the poor rates, 2 Vern. 317. But a lodger, or person that doth not pay to the poor, may be a witness, but he shall be intended housekeeper, and liable to pay parish rates, unless the contrary be made appear. 1 Williams, 600.

But note, that cross-examining a witness by one side, in any matter, tending to the merits, makes him a good \* witness for the other side, though otherwise liable to exceptions. 1 Vern. 254.

Plaintiffs cannot examine each other as witnesses in the cause; because, if the cause miscarries, the plaintiffs will be liable to costs, and therefore their swearing is to exempt themselves, and it is their own choice, that they are made plaintiffs, for without their consent they could not; but defendants are forced into the cause; and if their being made parties should absolutely invalidate their testimony, it would be in the power of any one who had a mind to oppress another, to deprive him of his defence, by making the most material witness defendants in the suit; and therefore, any of the defendants to a suit, may be examined as witnesses, either by the plaintiff, or by a defendant in the cause, saving just exceptions to their credit; as may a prochein amy, for the same reason. Ch. Ca. 214. Preced. in Ch. 411. Moseley's Rep. 312. And see 1 Vern. 230, where it is said, that a co-plaintiff, though but a trustee, cannot be examined as a witness, for the other plaintiff; and see Moseley's Rep. 312, where it is said, that the court will not give a defendant liberty to examine a plaintiff.

The court will give the plaintiff leave to examine any of the defendants, who are not interested for the plaintiff.

\* 857

Where a plaintiff is obliged to make several persons defendants, purely out \* of form, the court will give leave to examine those, who are not concerned in interest, that is, who are not interested for the plaintiff; and it would be hard, where the plaintiff is obliged to make parties not interested defendants, that he should lose the benefit of their testimony; and therefore the court, upon motion of the plaintiff's attorney, will grant a general order, for liberty to examine such a defendant saving exceptions; and if the defendant to be examined, be not a necessary party, the court, on such motion as aforesaid, will give leave to strike him out of the bill. But note, in this case, the court, on motion of the defendant's attorney, will

## Of Witnesses, &c.

order the plaintiff to pay the defendant the cost of his answer before he examines him; so ordered in this court, in the case of *Temple against Wilson*, 26th June, 1750.

But a defendant, who is examined as a witness for the plaintiff, may demur to an interrogatory, because he is concerned in interest in the question; for he shall not be obliged on interrogatories, to prove the plaintiff's title against himself, although he must by answer discover against himself; but then he has the advice of counsel. *Moseley's Rep.* 196, 229. 2 Ch. 2. 208.

But defendant may demur to the interrogatories, if concerned in interest.

\* And though a defendant cannot demur to a bill, but for matter appearing in the bill itself, yet a witness may demur for matters *dehors*, to the interrogatory, because he has no other way to relieve himself, but by demurrer; but then the facts must be verified by affidavits. *Moseley's Rep.* 229. *Sed vide 1 Vern. 165.*

\* 858

Though a defendant cannot demur, but to matter in the bill, yet a witness may for matters dehors to the interrogatory.

But if such defendant be witness to a deed, he shall be examined as to the execution of it, but may demur to any other questions. *Ibidem* 196. *Curs. Cane.* 244, 284.

But a defendant examined, only as to the execution of a deed, shall not demur. Cause may be shewn against a defendant being examined de bene esse, after hearing, if he be a party interested.

Although it is an order of course to examine a defendant *de novo*, saving just exceptions; yet when the cause is heard, and referred to an account, and it appears such defendant is a party interested, it is proper to shew cause against such an order, before the witness be examined: *1 Vern. 452.*

If defendant be examined as a witness, plaintiff must stand by his depositions as conclusive; and where a defendant is first examined, you shall not examine witnesses, to convict him of perjury. *2 Har. Ch. Pract.* 3d Edit. 25.

Defendant examined as a witness, his testimony is conclusive; and no attempt to examine to convict him of perjury.

\* A witness found to swear falsely in part, his testimony ought to be rejected. *Dalton*, pa. 271. *2 Har. Ch. Pract.* 55.

\* 859  
A witness swearing falsely in part, his testimony rejected.

In all cases in law and equity, a man and his wife, are but one witness. *Ibidem.*

Man and wife, but one witness.

A witness having finished his examination on an account, was moved to have him examined on the other side, and allowed. *Ayl. 47.* *2 Har. Ch. Pract.* 52.

A witness examined on the account, may be examined on the other side.

Where

## Of Witnesses, &c.

A witness examined on both sides, and contradicting himself, to attend to explain himself. Where witness's depositions on the one side, contradict his depositions on the other, the course is, to order him to appear before the court, to explain himself, otherwise his depositions shall be suppressed. *Ibidem*, and *Ch. Ca. 298.*

Trustees not to be examined against each other. Trustees shall not be examined, one against another. *Har. Ch. Pract. 53.*

Nor parties interested, to prove a custom. Parties interested shall not be examined, to prove a custom. *Ibidem.*

Witness examined in one court, not to be examined in another, to same point. Witnesses formerly examined in *scaccaris*, not to be re-examined in *Chancery*, as to the same matter. *Ibidem*, and *Ch. Ca. 233.*

Witness refusing motion, will suppress his *ex parte* deposition. *2 Har. Ch. Pract. 54.* and *Ch. Ca. 322.*

No exceptions to a witness, after publication. It is said, that no exceptions are to be taken to a witness, after publication hath passed in the cause. *Ch. Ca. 322.* and *Har. Ch. Pract. 54. sed vide pa. 869.*

A legatee of any will or codicil, who are to be deemed legal witnesses, with a witness to a will or codicil, and it shall be only void, as to what concerns him. Some doubts having arisen upon the aforesaid statute, it was enacted, by the 25th of George 2d. *Ch. 11.*, "That any person shall attest the execution of any will or codicil made after the 24th day of June, 1752, to whom any benefical devise, legacy, estate, interest, gift, or appointment, affecting any real or personal estate, except char-

" on land, for payment of debts, shall be thereby given such devise, &c." shall so far only, as concerns such persons attending the execution of such will or codicil, or any person claiming under him, be void, and such person shall be admitted as a witness, to the execution of such will or codicil, notwithstanding such a devise, &c.

\* 861 A creditor may be a witness to a will or codicil, charging lands with the payment of debts. \* And by sect. 2. In case, by any will, or codicil, lands, tenements, or hereditaments, shall be charged with any debts, and any creditor whose debt is so charged, be attested, or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness, to the execution of such will or codicil.

Where a legatee shall be a witness on payment, release, or tender and refusal. And by sect. 3. If any person hath attested the execution of any will or codicil, made on or before the 24th day of June, 1752, to whom any legacy or bequest is thereby given, whether charged upon lands or not, and such person, before

## *Of Witnesses, &c.*

shall give his testimony concerning the execution of such will or codicil, shall have been paid, or have accepted, or released, or shall have refused to accept such legacy or bequest, upon tender made thereof, such person shall be admitted as a witness, to the execution of such will or codicil, notwithstanding such legacy or bequest.

And by sect. 4. In case of such tender and refusal, such person shall in no wise be entitled to such legacy or bequest, and shall be barred therefrom. And in case of such acceptance, such person shall retain to his own use, the \* legacy or bequest, which shall have been so paid, or accepted, notwithstanding such will or codicil shall afterwards be adjudged to be void, for want of due execution, or for any other cause.

Légittee to be barred, after tender and refusal, and after acceptance shall retain his legacy, though the will should be adjudged void.

\* 862

And by sect. 5. In case any such legatee, who hath attended the execution of any will or codicil, made on or before the 24th day of June, 1752, shall have died in the life time of the testator, or before he shall have received, or released the legacy or bequest, so given to him, and before he shall have refused to receive such legacy or bequest, or tender made thereof, such legatee shall be deemed a legal witness, to the execution of such will or codicil, notwithstanding such legacy or bequest.

Legatee dying in testator's life time, or before payment and refusal, shall be a legal witness

By sect. 6. Provided, that the credit of every witness, in any of the cases before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court, and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of, as the credit of witnesses in all other cases, ought to be considered of and determined.

The credit of every such witness, to be subject to the determination of the court and the jury.

\* And by sect. 7. No person to whom any beneficial interest shall be given, which is hereby enacted to be void, or who shall have refused to receive any such legacy or bequest, or tender made, or who shall have been examined, as a witness, concerning the execution of such will or codicil, shall after he shall have been so examined, demand or receive any benefit from such interest, by any such will or codicil, or demand, or accept from any person, such legacy, or bequest, or any compensation for the same, under any pretence.

\* 863

No person to secure or receive any compensation, &c. after he has been examined to a will, or codicil.

And by sect. 8. In case any person shall give, secure, or agree to pay, or shall receive, or accept from any person, any such legacy, or bequest, or any satisfaction, or security for the same, contrary to the intent hereof, every person offending herein, and being thereof convicted, shall suffer imprisonment for three years. And every such security or agreement, declared to be void.

The penalty for so doing.

And

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Not to extend to any heir at law, the case of an heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested, according to the statute 7 Will. 3. cap. 12. or any \* person claiming under them respectively, who has been in quiet possession, for two years next preceding the 6th day of May, 1751, of such lands, whereof he has been in quiet possession, as aforesaid: And nothing herein contained shall extend to any will or codicil, the validity whereof hath been contested in any suit in law, or equity, commenced by the heir of such devisor, or the devisee, in any such prior will, or codicil, for recovering the lands, &c. mentioned to be devised in any will or codicil so contested, or for obtaining any other judgment or decree relative thereto, before the said sixth day of May 1751, and which has been already determined, in favour of such heir at law, or devisee, or any person claiming under them respectively; or which is still depending, and has been prosecuted with due diligence, but the validity of every such will or codicil, and the competency of the witnesses thereto shall be adjudged in the same manner, as if this act had never been made.

What shall be deemed possession by such heir at law.

\* 864

And by sect. 10. No possession of any heir at law, or devisee in such prior will, or codicil as aforesaid, or of any person, claiming under them respectively, which is construed with, or may be warranted under any will or codicil, attested according to this act, or where the estate descended to such heir at law, till a future or executory devise, by virtue of any will or codicil, attested according to this act, should take effect, shall be deemed to be a possession, within the intent of the clause herein last before-contained. *Brit. Stat. 25 Geo. 3. Cap. 5.*

## Of Witnesses, &c.

Where Want of Reputation, Integrity, or Capacity, shall exclude a Person from Testimony.

THE several sorts of persons excluded from testimony, for want of integrity, are such as are stigmatized. There are several crimes that so blemish the reputation, that the party is ever unfit to be a witness, as treason, felony, perjury, forgery, and the like; because he cannot be thought to have any great regard for an oath: And presumption of an integrity and veracity fails in such cases; nay, such presumption is the other way.

What persons are excluded from testimony.

The common punishment that follows the *crimen falsi* is the pillory; and anciently no person pilloried could be a witness; but now, unless it be *pro crimine falsi*, as perjury, forgery, or the like, it will not take away the evidence. 5 Mod. 15. 74.

A person pilloried for forgery, or perjury, &c. not to be a witness.

\* A person convicted of felony, or perjury, after a Statute pardon, is a good witness; and also, after burning in the hand, which amounts to a Statute pardon. Ray. 370.-380. Gold. 88. Sty. 388. 1 Vent. 349. 2 Hale, 278. 2 Hawk. 364.

\* 866  
A Statute pardon restores the credit.

But whether the king's pardon restores his credit, or no, has been a question. The king's pardon takes away the punishment, but doth not remove the turpitude of the crime. 1 Buls. 154. 11 H. 4. 41. 1 Sid. 51, 272.

If the king's pardon restores the credit.

Others hold, the king's pardon restores the reputation, that it takes away *pænam & culpm in foro humano*; for the loss of reputation is part of the punishment, and the pardon takes off the whole punishment: So that the law is now held to be, that, for perjury at common law, the pardon takes off every part of the penalty; but perjury on the Statute the king cannot pardon at all. Hob. 83. 288. Moor, 872. 2 Hale, 278. 2 Hawk. 364.

Ibidem.

In the case of *Newell* against *Maffy* in this court, one *Richard Newell*, who was convicted of forgery, was admitted as a witness, and was examined *viva voce*: The case was shortly thus:

What pardon shall restore a person to his credit, who hath been convicted

of a crime, that would have excluded him from his testimony as a witness.

\* *Maffy* brought an ejectment at law, and *Newell* defended by a deed under the defendant's grandfather; upon that trial, *Newel*, being a subscribing witness, denied his hand; so *Maffy* got

\* 867

## Of Witnesses, &c.

got a verdict. *Newell* filed his bill in this court, for an injunction, and proved thirty years possession going along with the deed, and the hand-writing of two witnesses, who were dead, and *Powell's* hand also; and procured an order for having *Powell* examined, *viva voce*, on the hearing in the court, and offered to read the proof of his hand-writing. The defendant would have examined *Powell*, and, in order to make him a competent witness, produced a charter of pardon granted to *Powell*; so the matter was debated, and the distinction was thus:—If *Powell* had been convicted on the statute of queen *Elizabeth*, the pardon would not have made him *rectus in curia*, but in regard he was found guilty by the common law, the pardon restored him to his credit, and took away the *penam* as well as the *reatum*, though it was *crimen falsi*; so the court admitted him to be sworn, who, on his examination, denied his hand, and an issue at law was directed to try the deed. Authorities produced by Mr. *Jocelyn*, to shew that the pardon made *Powell* a competent witness, were *Hob.* 81. 88. *1 Vesp.* 349. \* *Raym.* 379 387. *2 Sid.* 52. *Moor,* 872.

\* 868

349. \* *Raym.* 379 387. *2 Sid.* 52. *Moor,* 872.

The hand-writing of a witness found guilty of perjury, proved by a witness.

In the case of *Hodder* against *Lewis* and his wife, in this court, *John Shaw*, who was the only surviving witness to a will, denied his hand; he was found guilty of perjury in that particular, and on a subsequent hearing, his hand was admitted to be proved by witnesses.

RULE.  
Of exhibiting  
articles to the  
credit of a wit-  
ness.

By a rule, made the 3d of June, 1712, if either party has mind to examine, touching the credit or reputation of any of the witnesses, in such case, the court, upon counsel's motion, and upon notice given, will give leave to either party to exhibit articles to the credit of a witness; but by such order, the party is only at liberty to examine in general to the reputation of the witness, who is to be named in the order; for the court will not give leave to examine into any particular facts, or crimes, committed by such witness.

If they may be  
before publica-  
tion.

\* 869.

In the case of *Kenny*, executor of *Higley*, against the Attorney General, and others, in this court, Trinity term, 1752, a motion was made, on behalf of the Attorney-General, before publication, to exhibit articles to the credit of witnesses examined for the plaintiff: But the counsel for the defendant \* opposed the motion; for, that it was irregular before publication, as that after publication it may appear, the witness had not deposed any thing material, and may prevent an unnecessary expence and trouble to the parties, and also prevent the throwing an aspersion on the credit of persons, when there may not be the least occasion for it. But it was insisted upon the other side, that, by the practice of the court, such examination may be as well before as after publication; that it may be fatal to refuse it, as the witnesses may die before publication passed; and it would be severe to attempt to impeach

## Of Witnesses, &c.

the credit of a man after his death. Whereupon the court ordered precedents to be searched for in the court of Chancery and this court, and it appearing, that in both courts such articles had been exhibited, as well before as after publication; but no precedent appearing, where the matter had been fully debated, and the motion being again brought on by the defendant, it was granted without any opposition from the counsel for the plaintiff.—Some of the cases in this court, produced on the motion, were *Teeling* and others against *Dillon* and others, 11th November, 1735. *Tobin* against *Bird*, 23d July, 1736. and *Higley* against *Darling*, 27th June, 1749. See *Bund. Rep.* 46, *Boning* against *Sprot*.

\* As soon as the articles to the credit of a witness are ready, the court is to be moved for liberty to exhibit them; then they are to be filed, and notice thereof to be given to the adverse party. They are to be signed by the party, as well as by the counsel and attorney; and the interrogatories are to be drawn on these articles, on which you may examine in town, or by commission.

\* 870  
The proceedings on such examination.

By the 38th general rule, no interrogatories are to be exhibited to invalidate the credit of any witness, without first giving four days notice thereof to the attorney of the other party, before they examine on such interrogatories.

RULE.  
Notice to be given, on exhibiting interrogatories to invalidate the credit of witnesses. After publication you may examine to the competency as well as to the credibility of a witness.

It has been held, that after publication, you may examine as to the credibility, but not as to the competency of a witness. But in the case of *Needham* against *Smith*, it was determined, by the lord-keeper, assisted by two judges, that this was a distinction, without colour of reason; and that if you may examine to the credibility, which goes to the part, you may certainly examine to the competency, which goes to the whole, and totally destroys his evidence. 2 *Vern.* 464.

\* And if, after the hearing, a witness is convicted of perjury, you may take advantage of it upon a re-hearing. 2 *Vern.* 464.

\* 871  
Witness, after hearing, convicted of perjury, advantage may be taken of it on a re-hearing.

Conviction of perjury, without judgment, cannot weaken the credit of the witness; for then the allegations in the indictment are supposed to be defective, and one cannot be intended to make competent proofs on insufficient allegations. *Raym.* 32. 1 *Sid.* 51.

Conviction of perjury, without judgment, not sufficient to weaken the credit of a witness.

Infidels

## Of Witnesses, &c.

Infidels not allowed as witnesses.

Infidels cannot be witnesses, because under none of the obligations of our religion; and where the binding force of an oath ceases, the reasons and grounds of belief are absolutely dissolved. *2 Hawk. P. C. 434. Co. Lit. 6.*

But Jews are, when sworn on the old testament.

But Jews are allowed, when sworn on the old testament, which is part of our belief; but these are totally excluded by the civil law, which says, jews and heretics shall not be admitted against the faithful. *2 Hale's Pl. 52. 279.*

Persons excommunicated cannot be witnesses.

Persons excommunicated cannot be witnesses, because by the law of the church they are excluded from converse; nay, her laws go so far as to excommunicate those who converse with them, and those who are excluded out of the church, are supposed to be \* under no influence of religion. *2 Bell. 155.*

But persons outlawed may be witnesses.

But persons outlawed may be witnesses, for that has no influence on their credit, and is a punishment of them only in their properties, and not in the loss of their reputation. See the *Law of Evidence*, by a late learned judge, 103. *Co. Lit. 6.*

But not persons who want understanding.

Persons excluded for want of understanding, are idiots, madmen, and children.

In what cases children are admitted as evidence.

Children under the age of fourteen are not regularly admitted as witnesses, yet they swear allegiance in the court at twelve. The law fixes no time wherein they are to be excluded from evidence, but their understanding is to be enquired into, and judged of, by questioning them. *Ibidem. and Hale's Pl. Cr. 634, 635. 2 Hale's Pl. Cr. 278 to 285.*

All persons who are good witnesses at law, are good witnesses in equity.

Upon the whole, all persons who are good witnesses at law are good witnesses in equity; for the rule of evidence is the same in equity as at law. See *1 Hale's Pl. Cr. 634, 635. Hale 278 to 285. 1 Inst. 6. B. 2 Hawk. P. C. 434. 1 Brown 47. Co. Lit. 6. The Law of Evidence*, by a late learned judge, 86 to 105.

Of parol or collateral Evidence, and where it shall be admitted to explain, confirm, or contradict, what appears on the Face of a Deed, or Will. \* 873

RECORDS when perfect, for avoiding infiniteness which the law abhors, estop all parties and privies from contradicting any thing apparent in the record, and a record cannot be confessed and avoided; as to say that he was not a person &c. &c. for then every record might be so avoided by a nude averment: But to make an averment which stands with the record, and which does not contradict any thing apparent in the record, to the judges, by construction of law upon the records, the law well admits and allows of. *Treatise of Equity*, 4.

Records, estop all parties and privies from contradicting any thing apparent in them. But an averment which stands with the record is allowed of.

So a deed indented, is the deed of both parties, though they were the words of but one, for both seal it, and of consequence estopped by it, viz. in all the material and essential parts, without which, it would not be good, otherwise of a patent or deed poll; because the estoppel there is not mutual, as it ought to be. *Ibidem*.

A deed indented is the deed of both parties, though they were the words of one.

Otherwise of a patent or deed poll.

But a party may plead to a deed, or confess, or avoid it.

\* 874

But no averment against the judgment of law, which appears on view.

Estoppels by record, relieved against in equity

But to a deed they may plead, *non est factum, & pari ratione*, they confess \* and avoid it, as by coverture, or the like: And though a deed is *prima facie*, an estoppel, yet they may plead, aver any matter of fact, which stands with the words of the deed. But no averment can be taken against the judgment of law, which appears to the judges upon view of the deed; matter of fact is to be tried by the jury, but matter of law the judges only. *Treatise of Equity*, 125.

But in case of estoppels, verdict against the truth, or the being founded upon an untrue presumption, *Chancery* will believe. And although such assurances as are used for the common repose of mens' estates, equity will not draw in question (for a fine with proclamations ought after five years to be a bar in conscience, as it is in law; so shall it be of a common recovery for docking the entail) yet, if a fine is unconditionally obtained, equity will order a reconveyance, and the court, where it is acknowledged, will vacate it for error, or regularity. *Ibidem*.

Neither is a judgment at law to be pleaded in bar, to a suit in equity, notwithstanding the statute of 4 H. 4. ch. 23, before that statute meant only to restrain such jurisdiction, as to take upon it to reverse the judgment, as \* error and attainant which the *Chancery* never pretended to, but leaves the judgment

A judgment at law not pleadable in bar to a suit in equity.

\* 875

## Of Witnesses, &c.

judgment in peace, and only meddles with the corrupt conscience of the party. And although it is said that the common law used some power, to restrain such examinations directly before any statute made; yet these seem rather to examine the manner, than the very matter and substance of the thing adjudged. *Treatise of Equity*, 125.

So estoppels by  
deed are re-  
lieved against in  
equity.

So in natural justice, deeds and writings are considered only as memorials of the contract, not as a substantial part of them, and therefore any other proof is as well, and the estoppel will not in equity be regarded against the truth: As if a covenant be general, that he was lawfully seized, and there is a proof that it was declared upon sealing, that he should undertake for his own act only, he shall be relieved. *Ibidem*.

*Ibidem.*

So if in the purchase of a manor a copy-hold being a little before escheated, was not intended to pass in demesne, and was left out of the particular; yet the conveyance was sufficient to pass it at law, the vendor shall be relieved in equity. *Ibidem.*

*Ibidem.*

\* 876

So where a lease for years was made in trustees, precedent to the wife's settlement, only to protect the wife's \* estate against the violence of the times, and not to exclude the husband, but the sequestrators; upon proof of this, by one single witness of an undoubted reputation, the nature of the case requiring secrecy, *Chancery* will relieve against the trust expressed in the deed. *Treatise of Equity*, 126.

A mistake by a  
steward in the  
surrender of a  
copy-hold, the  
court at law  
will admit an  
averment of it.

No parol proof.

And in case of a surrender made by a steward of a copy-hold, if there be any mistake there, that is only matter of fact, the courts at law will in that case admit an averment that there was a mistake, &c. either as to the lands or not. *Ibidem.*

As for a testament proved *sub sigillo episcopi*, it is no estoppel, yet the last will of a man is looked upon as the last serious of his life, as to the disposition of his estate, and must be admitted sufficient to repeal all former wills; and much more controll all parol declarations. *Ibidem.*

*Ibidem.*

\* 877

And the constant rule of law has been to reject all parol proof, brought to supply the words of a will, or to express the intent of the testator; and that nothing *dehors* should be averred, is the express resolution in lord *Cheyney's* case, 50 67. And this rule has been thought necessary to be adhered to, not only on account of the statute \* of frauds and perjuries, which was made to prevent perjury, contrariety of evidence, and uncertainty; but because little regard ought to be had to the expressions of the testator, either before or after making his will; because possibly those expressions might be used by him on purpose to controul or disguise what he did.

## Of Witnesses, &c.

going, or to keep the family quiet, or for other secret motives and inducements, which cannot after his death be found out. It is to be considered, therefore, as it stands upon the will alone, and would have been so, even before the making of the Statute of Frauds and Perjuries; for by the Statute of Wills, by which men are enabled to make wills, and devise their lands, there must be a will in writing; and, should parol proof be admitted, it would introduce a mighty uncertainty, and an infinite inconvenience. *Treatise of Equity*, 126.

But this rule has received a distinction, which has greatly prevailed, viz. between evidence offered to a court, and evidence offered to a jury; for in the last case no parol evidence is to be admitted, lest the jury might be inveigled by it; but in the first it can do no hurt, being to inform the conscience of the court, who cannot be biased or prejudiced by it; and, therefore, tho' such an averment could not be admitted, where it was to make the party a title; yet, where it was only to rebut an equity, it might; as where A. charged his real estate with payment of his legacies and debts, and devised his estate so charged to the defendant his nephew, and made the plaintiff, his wife, executrix, proofs may be admitted, that it was A's intention that she should have the personal estate clear of the debts; and if it were taken from her by the creditors, she should come in as a creditor on the real estate. *Treatise of Equity*, 126. 2 Vern. 98. 252. 337. 625.

Of the difference taken between evidence offered to the court, and evidence offered to the jury.

\* 878

So, where a money legacy, given to an executor, shall exclude him from the surplus, the presumption being that the testator did not intend him all, and some; yet such presumption may be ousted, or taken away, by a proof of the testator's intention, that his executor should have the surplus, or, that his next of kin should not have it, especially if a specific legacy were given to the next of kin; for one may over the trust of a personal estate. *Treatise of Equity*, 126.

So the construction of making a gift a satisfaction, has, in many cases, been carried too far; it is therefore reasonable, in such cases, to admit of parol proof as to the testator's intention. However, the later resolutions have\* been very cautious of admitting parol evidences, because they encourage suits and litigations, and introduce the very mischiefs that the law intended to prevent. *Treatise of Equity*, 127, and 2 Vern. 93.

But courts of equity are of late very cautious in admitting parol evidences.

\* 879

No hurt to admit collateral proof to ascertain the person or thing described in a will.

ing

But although no proof ought to be received, to supply the words of a will, since the will that must pass the land must be in writing, and must be determined only by what is contained in the written will; yet there can be no hurt in admitting collateral proof, to make certain the person or the thing described; as where A. devised to B. lands of sixty pound per annum, pay-

## Of Witneſſes, &c.

ing one hundred pound, which he by bond owed *J. N.* it happened, that the hundred pound by bond was not due to *J. N.* but to *S. H.* but the person who drew the will having sworn, that the testator intended the debt to *S. H.* the devisee of the lands shall be liable. *Treatise of Equity*, 127.

*Ibidem.*

\* 880

So to ascertain the thing, notwithstanding the statute of frauds; for it neither adds to nor alters the will, but only explains which of the meanings shall be taken. Yet some have doubted, whether they could read witneſſes on a will of land by the statute, though it were only in preservation of the devise: But to be ſure, if the devise would \* admit of any ſenſe, they could not be read. *Treatise of Equity*, 127.

Collateral proof was allowed, to make certain a person or thing described in a will. 2 *Vern.* 517. 593. But it was in case of a personal fortune.

*Ibidem.*

So, where one having two ſons, both named *John*, devife land to his ſon *John*, there parol proof was admitted, to ſhew which *John* the father meant; and yet *additio probat minoritatis*. See 5 *Coke*, 68, lord *Cheyney's* caſe. So, if there were two persons, both named *J. S. of Dale*, and I ſhould devife land to *J. S. of Dale*, parol evidence would be admitted in ſuch caſe, which *J. S. of Dale* was intended by me. So where one feized in fee, as heir of the mother's ſide, devifes land after payment of ſeveral annuities, to the testator's right heir of the mother's ſide for ever, parol evidence admitted, to prove which heir was intended, whether the heirs of the mother's mother's ſide, or the heir of the mother's father's ſide. *Williams*, 136.

An estate charged with an annuity upon parol evidence.

\* 881

But one devifes lands to his brother, and makes him executor, and wills, that his brother, out of the personal estate and half a year's rent of the real estate, ſhall pay his legacy, and gives an annuity to his \* nephew; upon parol evidence, that the brother promised the testator to pay the annuity, otherwise he would have charged his real estate therewith, the real estate was decreed to be charged with the annuity. *Vern.* 506.

Parol proof admitted to ouſt an implication, or rebut an equity, in relation to a perſonal fortune.

One by will gives his executor an express legacy, and makes no diſpoſition of the ſurplus; the court will admit of parol evidence, to ſhew the intention of the testator; and if proved that the testator intended the ſurplus to the executor, he ſhall have it, notwithstanding his express legacy, it being to ouſt an implication or rule in equity. 2 *Vern.* 648. 675. 736. See also 1 *Williams*, 116, where it is ſaid, that although it be dangerous to admit of parol proof, where there is a will in writing, however, in relation to a perſonal fortune, the court will allow of proofs and averments; ſo that if there be plain and undisputed

## Of Writs, &c.

indisputable proof of the testator declaring and intending, that his executor should have the surplus, this will intitle him thereto, even though such proof was but parol proof, and although he had an express legacy, for the executor has a legal title to the surplus. And this parol proof would be only to rebut an equity, arising by implication to the next of kin, by reason of the express legacy given to the executor. See 2 Williams, 210.

\* One makes his will, and A. B. and C. his executors in trust, and gives them twenty shillings a-piece for a remembrance above their charges; parol proof was admitted to prove, that this was a trust for the wife only. 2 Vern. 99.

\* 882

Parol proof ad-  
mitted to ex-  
plain a trust.

In the case of *Brown against Sekvil*, and *e contra*, in Talbot's Reports, 240 to 243, Michaelmas term, 1734, it was determined, that parol proof shall not in any case be admitted, to alter the construction of a will, or to make the construction against the plain words of a will; and his lordship declared, that none of the cases, where parol evidence hath been admitted, have gone so far as either of these, the farthest then to rebut an equity, or resulting trust. The parol evidence in these cases tended to support the intention of the testator, consistent with a written will. And upon an appeal to the house of lords, the decree was affirmed, and the lords would not allow the parol evidence to be read, nor even the respondent's answer, as to these matters.

Parol proof not  
in any case ad-  
mitted to alter  
the construction  
of a will, and  
in what cases  
only it shall be  
admitted.

And it is a settled rule in the court of Chancery, that although they will read parol proof, to fortify any natural construction that arises from the words of the will; yet they will never read any parol proof, to make any alteration in the will, or addition to it. And if the bequest cannot be made out, but by the parol deposition of the witnesses, there being only initial letters for the names of the legatees, as it is not substantive in writing, it is not a written but a nuncupative will; and therefore, without the circumstances required by the statute, is void. *Treatise of Equity*, 127.

And where the  
bequest is not  
substantive in  
writing, it is  
void.

\* 883

Parol evidence when it concurs with a conveyance, and is only to rebut a pretended resulting trust, shall be admitted to shew the intention of the party. 1 Williams, 113.

Parol evidence  
to rebut a pre-  
tended resulting  
trust, when it  
concurs with  
the deed.

Of the Discovery of Evidence, and where, for whom,  
and against whom, it lies.

Discovery  
where it lies.

\* 884

**I**N the law of nature, when deeds and undeniable instruments cannot be produced, they must then give judgment against the defendant, according to the testimony of witnesses, or with consent of the other party, give him his oath, I say, with the consent of the other party, for else, in the liberty of nature, no man is obliged to put the issue of his cause upon another man's conscience. And in the civil \* law, the judge *ex officio*, if he saw occasion, might put the defendant to his oath, or the party interested might demand it; and this was decisive between the parties, and their representatives, but did not hurt a third person. So in *Chancery* though witnesses are examined, yet you may afterwards examine the defendant. *Treatise of Equity*, 128.

Bill of discovery  
of evidences, in  
what cases.

So where a person has a demand against another, but cannot ascertain it, or support his case, without the confession of some matter, that rests within his knowledge only, against whom he seeks relief; in such case, if the plaintiff has commenced or intends to commence an action at law, for recovery of his demand, he may prefer his bill in a court of equity, to aid his suit, and for discovery of such matter, as he apprehends will entitle him to recover at law \*.

\* 885  
Ibidem.

For the discove-  
ry of an estate,  
by one who has  
a title.

\* This bill also lies in the nature of a cross bill, against the plaintiff in the original cause, for discovery of evidence only. See Title *Cross Bill*.

And a bill lies there for the discovery of an estate, by one who had a title to it; as by the patentee of the goods of a felon, or of one outlawed; for outlawry is in nature of a gift or judgment to the king. *Treatise of Equity*, 128.

\* I have seldom seen any great advantage gained by plaintiffs, from the answers to these bills, on trials at law; for the whole confession is to be taken together, and the plaintiff shall not only take what makes against the defendant, in his answer, and leave out what makes for him. It is to be read as the sense of the party himself, and it is to be taken in this manner; it is to be taken entire and unbroken; wherefore as defendants generally introduce some matters in their answers, by way either of justification, or of qualifying, it is often more prudent, for plaintiffs not to introduce them at all.

But it is not so in equity upon a cross bill, unless the plaintiff fails to reply whereby the defendant is deprived of an opportunity of examining witnesses to prove his answer. See 2 *Vestl.* 72. 3 *Mod.* 259. *Cerit.* 3 *Williams*, 337.

## Of Witnesses, &c.

So where *A*. obtained judgment against *B*. and the defendant to defraud him of the benefit of it, assigned his estate to trustees, for himself; *A*. may have a discovery, though it is objected that this is in the nature of a foreign attachment, and that there could not be a discovery, of a man's personal estate, in his life-time; but if the plaintiff in such case has not taken out execution, it will not be allowed. And it seems agreed, it would not lie against the debtor himself; nor to have a general discovery from a third person, \* but only for particular things, so adjudged upon a demurrer. *1 Vern. 399, Angel and Draper.* But where the bill is to discover particular goods, it will lie, although execution be not taken out. See *Bac. Equ. Ca. 132.*

Bills to discover goods in a third person's hands, must be after judgment and execution taken out.

\* 886

Unless it be to discover particular goods.

So where a fire happens in a man's house, and burns his neighbour's likewise, although he is liable to damages at law, yet the plaintiff in such case shall not be assisted in equity; for though the law gives an action, yet it does not arise out of any contract, or undertaking of the party. *Treatise of Equity, 128.*

So a discovery doth not lie in equity, where the action at law is for a matter that doth not arise from the contract of the party.

But it will lie where there is a contract express or implied.

But the case is not parallel, where a lighter is overset by negligence of the lighter man, or a ship takes fire, by the negligence of the master, or ship's crew, these come within the reason of any common carrier, and therefore the plaintiff shall have a discovery, to enable him to bring his action. *2 Vern. 442.*

Yet a plaintiff is not admitted to a discovery, without verifying his title at law, so that if there be a full answer given to the thing in demand, till that be tried the defendants are not bound to discover; as in a bill for tythes, if they plead the statute of 13th Elizabeth, Cap. 20, against non-residence, in bar; or in case of tythes\* of conies by custom, if they deny the custom: And the rather because the demand was against common right; and if it should be otherwise, the defendant, by a feigned suggestion, might be forced to discover any thing. But if in that case, the matter be found against the defendant, he shall after be examined upon interrogatories. But where there is no such great inconvenience, as upon a bill against an executor, to discover assets, he must answer, though he denies the debt; because it concerns the act of another. *Treatise of Equity, 129.*

But a plaintiff shall not be admitted to a discovery, without verifying his title at law.

\* 887

An executor must answer a bill to discover assets,

A bill was brought, to discover who was owner of a wharf and lighter, to enable the plaintiff to bring an action for the damages his goods sustained, by the lighter's being over-set, by the negligence of the lighter-man; to which the defendant demurred, but the demurrer was over-ruled. Between Sir John Heathcote and Sir John Fleet. *2 Vern. 442.*

A bill lies to discover the owner of a wharf, to enable the plaintiff to bring an action at law.

## Of Witnessess, &c.

To discover who was tenant to a freehold, in order to bring a *formedon*, not allowed.

A bill was brought, to discover who was tenant of the freehold, in order to bring a *formedon*; to which there was a demurrer, and it was allowed. *Hilary 1683*, between *Sideton* and *Sherrard*. *1 Vern. 212*; though the case of *Bickham* and *Bickerton* was quoted to the contrary. *Vide Cary, 22*, where it is said, that such bills have been frequent.

\* 888

Not a tenant to a praetice on a voluntary conveyance. Sed quer.

A bill may be for the discovery of the testator's personal estate, before the will is proved.

\* A demurrer to a bill, brought to discover the tenant to a *praetice*, on a voluntary conveyance, allowed. *Mich. 1684*, between *Sherburn* and *Clark*. *1 Vern. 273*. *1 Vern. S. P.* by Lord Keeper, who said, that there were ways of knowing it without.

The plaintiff's bill was for a discovery of a personal estate, that was devised to charities, relating to the college of, &c. the defendant pleaded that the will was not yet proved, but was controverted in the spiritual court; but the court overruled the plea, a discovery of the estate being for the benefit of persons interested therein, and necessary for the preservation thereof. *Pasch. 1688*, between *Dulwich* college and *Johnson*. *2 Vern. 49*. *1 Vern. 106. S. P. Accord*, where the right of administration was contested.

Of the persons for whom and against whom, a discovery will be admitted.

As to the difference of the persons for whom, and against whom a discovery will be admitted, it is to be observed, that persons who claim lands by a will, or any other voluntary disposition, having the law on their side, are entitled, as against an heir at law, to a discovery in equity, of deeds relating to the estate, and to have them delivered up; otherwise the heir might defend himself at law, by setting up \* prior incompatibilities; and by that means prevent the trying the validity of the will. See *Treatise of Equity*, 129.

Ibidem.

So where a will, concerning a personal estate, is proved in the spiritual court; another having a former will in his favour may bring his bill, to discover by what means the latter will was obtained, and to have an account of the personal estate, and whether the testator was not incapable and imposed on, though objected by the other party, that it belonged to the spiritual court only, to prove the validity of the will, and that the former will was not proved, in the spiritual court, as the will in his favour was. *Ibidem*.

Ibidem.

But if a bill is brought by a remote heir, for a discovery of a title and evidence, and to have terms removed, and the title at law cleared, this is one of the hard cases at law, where equity will not assist; for as equity will not relieve the children, should the remote heir recover, so neither will it assist the remote heir. *Ibidem*.

Not against a purchaser.

And purchasers shall not discover, to impeach or weaken their title; for by this method all purchases might be blown

## Of Witnesses, &c.

up. As whether in a mortgage, made by A. to B. which had been assigned to the defendant; there was not some trust declared, for the \* benefit of the plaintiff, though plaintiff charged in his bill that such a lease in defendant's custody mentioned it; for this is but a side wind, to make a purchaser expose his title; and the court will not do it, unless the plaintiff makes some proof towards falsifying his answer, to induce them to it. *Treatise of Equity*, 129.

\* 89a

So an assignee of a lease shall not be forced to discover, whether the lease was expired. *Ibidem*.

Assignee of a lease not forced to discover if it be expired.

The court will not help a man to evidence, to evict a possession.

Nor help the issue against a purchaser, tho' they will help the heir against a bounty.

A bill to discover a deed, against a mortgagee or jointress, whereby the plaintiff would defeat their title, shall never have a discovery but on confirming the title.

\* 89b

So if a bill is brought by an heir at law, or any other person, against a mortgagee, or jointress, whereby the party would avoid the jointure, or mortgage, under pretence his ancestor was but tenant for life, and if he seeks for a discovery of deeds and writings, to avoid the title of the \* mortgagee, or jointress, he shall never have such a discovery, unless he by his bill submits to confirm the title, and then he shall.

And if a jointress prays a discovery, against an heir at law, of deeds and writings; if the heir at law submits to answer, to confirm the jointress's title, she shall have no such discovery. See lord chief baron Gilbert's manuscript *History of the court of Chancery*, under Title *Revisor*.

Nor shall an heir at law be obliged to discover his deeds, on a bill against him by the jointress, if by answer he submits to confirm her jointure.

But with respect to the personal estate, there is difference between contracts that are negotiable, and such as are not, or where they are not negotiated in a mercantile way, and where the note passes as ready money. As if it were assigned as a collateral security, for a debt already contracted; for there, if the note was fraudulently obtained, or by gaming, he has no remedy against the drawer. But if he actually negotiates it for value, the indorsee shall in all events, have his money of the drawer, though he has paid it before, or it was obtained by fraud; because the indorsee has a legal right to the note, and a legal remedy at law, which the court of equity ought not to take away from him, and it would be to the ruin of all commerce, if the original cause, and consideration \* of such note, should be enquired into. *Treatise of Equity*, 130.

Of the difference between negotiable contracts and others.

\* 89c

But

## Of Witneſſes, &c.

Alligee of a  
choſe in action,  
has no remedy  
at law.

But the assignee of a chofe in action has no remedy at law, or right to sue in his own name, and has only an equitable remedy: And this fails, when the bond or covenant is obtained by fraud, or the obligor has a legal discharge, as a release upon payment of the money. So, if the bond were assigned for value before payment, there an equitable interest passes; and in such case, if the obligor pays the money to the obligee, and cannot plead such payment at law, a court of equity will not interpose to assist him. But if he can, equity will not interpose to assist the assignee. *Ibidem.*

No one is bound  
to discover mat-  
ters, which sub-  
ject him to pe-  
nalties or for-  
feitures.

In the civil law, the oath was only to be tendered in civil matters, when the facts and circumstances may render the use of an oath just and decent, and not in criminal matters, any more than in the law of *England*. And it is a standing rule in equity, that no one is bound to betray himself; for it is the businels of courts of equity, to relieve against, not to affit forfeitures; and by law, no one is bound to discover any matters which tend to subject himself to penalties or forfeitures as a penal clause in an act of parliament, or in a deed, though said it was not a \* penalty, but part of the contract. But otherwise, if he covenants not to plead or demur to any bill which should be brought against him in equity, or the plaintiff waives the penalty. And such pleas ought to have the greater strictness and exactness, as tend to the support of wrong doing. *Treatise of Equity*, 130, 131.—See Title *Answer*, &c.

\* 893  
A bill in some  
cases proper to  
discover a tres-  
pala.

And in ſome caſes, even for a trespass, a bill is proper enough in this court, viz. where, by the ſecret contriyanice of it, it can not easily be proved. As if a man, in his own ground, dig a way under ground to my mineral, and the like. So in caſe of a bill by the *East India company*, for a diſcovery, as to prevent an interloper's trading to the *East Indies*, there is great difficulty as to the proof, the matter, for the greater part, having been tranſacted in the *East Indies*; and therefore the plaintiffs ſetting forth, that they were willing to waive the forfeiture, ſhall have a diſcovery. *Ibidem*, 131.

And the defen-  
dant ſhall be  
compelled to  
discover the  
charge, though  
it make him a  
trespaſſer.

\* 894

So, where the charge is not by way of trespass, but under colour of title, as, that the defendant, by colour of feſqueſtione by the committee, had ſeized ſeveral tythes, &c. due to the plaintiff, the plaintiff may pray a diſcovery of the particulars ſo taken, and their value. So, where a man, by colour of a title, enters into an house, &c. and poſſeffes himſelf of the goods, &c. for it may be imposſible for the plaintiff diſcover the particulars, without ſuch bill. So, where a will is proved, and the precedent administration revoked, ſuch will is uſually neceſſary for the diſcovery of the goods; and yet in ſtrictneſſ of law, there was a trespass. *Treatise of Equity*, 130.

## Of Witnesses, &c.

A bill was exhibited by the Attorney-General in the Ex-  
~~in~~ quer, wherein it was charged, that the defendant, being a  
merchant, had concealed the custom of two hundred and ninety  
casks of currants, and for the better effecting thereof, had  
given forty pounds a-piece to two custom-house officers, and  
relief and discovery prayed; but upon a demurrer it was  
doubted, whether the defendant should be bound to discover.  
*Hart. 173, Hard. 201, S. P.* adjourned, where it was alledged,  
the Attorney-General would not prosecute for the forfeiture,  
but for the duty only.

Merchant may  
be obliged to  
discover goods,  
the customs of  
them being con-  
cealed, if the  
Attorney-  
General will  
not prosecute  
for the forfei-  
ture.

If a bill be exhibited, to discover whether a woman be married, or not, and marriage would be forfeiture of her estate, she is not obliged to discover. Such a bill dismissed, *Car. 2d. between Mommis and Mommis.* 2 Ch. Rep. 86. See the aforesaid case of lord and lady *Howth*, in *Chancery*, Title *Answer, &c.*

Not obliged to  
discover matter,  
which would  
subject a person  
to a forfeiture  
of his estate.

\* If a bill be brought to establish an agreement for a separate maintenance, and the wife seeks a discovery of hard usage, the husband may demur to that part, and it will be allowed. *Mich. 1682, between Hincks and Nelthorp.* 1 Vern. 204.

\* 895

Husband not  
obliged to dis-  
cover hard usage  
to his wife.

The bill was to discover whether the defendant had not assigned over a lease; the defendant pleads, that there was a proviso in the lease, that in case he assigned over, the lease should be void; and that this being in the nature of a penalty, or forfeiture, he ought not to be compelled, in a court of equity, to discover. For the plaintiff it was said, that this was not a penalty, but part of the contract; yet the plea was allowed. *Hill. 1700, between Fane and Astee.* Bac. Equ. Ca. 77.

Defendant  
may demur, if  
the bill be to  
discover what  
would subject  
him to a penali-  
ty or forfeiture.

The cause being brought to a hearing, where the bill was for discovery only, the question was, whether the bill should be dismissed, or the cause struck out of the paper? And the cause was ordered to be struck out; because the bill is never dismissed, where the plaintiff prays no relief; for the words of a dismissal are, *The court seeing no cause to relieve, &c.* *Mosley's Rep. 185.*

If the bill prays  
no relief, it  
cannot be dis-  
missed on hear-  
ing; it must be  
struck out of  
the paper.

\* Bills are sometimes brought in this court, to discover the heir and ter-tenants of lands, in order to bring a *scire facias* against them, to revive judgments: But note, it is said, that the bill need not require a discovery of any of the tenants, but such as have freeholds; for that none other are properly ter-tenants,

\* 896

Bills for dis-  
covery of ter-te-  
nants, in order  
to bring a *scire  
facias*.

*Of Wimesses, &c.*

ter-tenants, and they only should be served. And yet it is often practised, not only to serve such as are termors for years, but even every poor cottier; which is most improper, as it may occasion a most unnecessary trouble and expence to them.

Quere, if to  
serve an eject-  
ment.

But on ejectments, as it is said, that every cottier must be served, which is a great grievance, if such a bill lies in the case, (and there seems to be no reason why it should not, as well as in the case of the *scire facias* against the heir and ten-  
ants) the prayer of discovery, as to the tenants, must be more extensive.

**AN APP.**

A N

\* 897

## P P E N D I X,

C O N T A I N I N G

ome of the STANDING RULES of the Court, which, being either complex, and relating to different Heads, have been inserted but under one of the Heads; or which, though inserted, have not been marked as RULES: And also, a late ACT of Parliament relating to Process for the Possession of Lands, which had been overlooked before the WORK was printed, with some few cases which have been determined since.

### *Abatement and Revivor.*

BY the 22d general Rule, in case plaintiff or defendant die, pending a suit, *subpæna* upon a bill of revivor is to be taken out, which being \* done, after service and return of the process, all the proceedings in the former suit stand revived; and the cause and parties by thereupon proceed accordingly. *To be between the 4th and 5th lines in page 3. But see page 4.*

RULE.  
Bill of revivor  
and subpæna to  
revive in what  
causes and the  
proceedings.

\* 898

*Affidavits*

## A P P E N D I X.

### Affidavits.

**RULE.** By the latter part of the 51st general Rule, all affidavits, certificates, and reports, are to be entered, at least, the day before the motion is to be made thereon. *To be between the 15<sup>th</sup> and 16<sup>th</sup> lines in page 54, but see page 800.*

**RULE.** By the 21st general Rule, after the defendant hath sworn his answer, it shall not be delivered unto him, but unto his known attorney, who is to take care that the same be forthwith filed, in the chief remembrancer's office. *To be after the 2d paragraph, in page 92.*

**RULE.** By the 24th general Rule, *per*, no answer shall be deemed to be filed, until the contempt be purged; and until the same shall be so purged, the plaintiff may prosecute the contempt notwithstanding any answer alledged to have been filed. *See page 85. 437.*

\* 899

### \* Attachment, Contempt, Costs, Decree.

**RULE.** By the 71st general Rule, in all attachments for non performing of decrees, and for non-payment of costs, particular notice is to be taken in the body thereof, what it is for, to the end, that the sheriff may be the more careful and wary in the execution, or taking security in such cases. *See page 371 and 415.*

### Commissions to examine.

**RULE.** By the 76th general Rule, The commissioners, &c. *at 1<sup>st</sup> paragraph of page 590.*

### Costs, Dismiss.

By the 28th general Rule, if exceptions be taken to the draft of a decree, or dismiss, the exceptant is to deposite forty shillings cost; and if they be ruled for him, he is to be repaid the same, but if against him, the said forty shillings are to be paid to the other party. *To be after the 2d paragraph in page 384. See page 407.*

# APPENDIX.

## Hearing.

By the 45th general Rule, when witnesses are examined, the first rule for publication is to be entered of course, \* first giving notice \* to the attorney of the other side; and if the same be entered, or moved on the essoin day in the precedent term, and the second rule moved within six days of the next term, and thereupon publication granted, in such case, the cause may be set down to be heard in four days after Easter term, or in the eight days after any other term, as the same shall happen. And all causes are to be set down for hearing, by the chief remembrancer, according to the priority of publication, † if no order of court to the contrary.

RULE.  
Publication of  
the depositions  
and setting  
down the cause  
for hearing.

\* 900

By the 40th general Rule, if at the day of hearing the plaintiff be ready, and the defendant maketh default, affidavit to be made of serving the defendant with process, *ad audiendum judicium*, and the court will proceed to hearing: And after the plaintiff's bill is opened, the defendant's answer is to be read, and the plaintiff's proofs; whereupon, the court will decree or dismiss \* the cause, or otherwise order, as shall seem fit: But in such case, the court doth not use to make a decree absolute, but to give a day to the defendant to shew what he can against confirming the decree; at which day, if he does come and endeavour to shew cause to stay the decree, and thereupon the court doth decree, the defendant, in such case, shall pay down forty shillings, † or more, if the court think fit, for the plaintiff's double attendance by reason of the default of the defendant. See page 396.

All causes to be  
set down for  
hearing accord-  
ing to priority  
of publication.

RULE.  
If the defendant  
appears not, on  
the hearing, on  
affidavit of ser-  
vice of the pro-  
per process, the  
court will make  
a conditional  
decree.

\* 901

By the 67th general Rule, where no counsel appears for the defendant at the hearing, and process hath been duly served, the defendant's answer is to be read, and if the court,

RULE.  
Hearing where  
the defendant  
does not appear  
after service of  
process, and  
conditional  
decree.

\* This part of the rule has been altered, and the present practice is, as page 470 to 474.

† This part also of the rule has been altered, and the present practice is, in the aforesaid pages: But in the book of the court-rules, in the chief remembrancer's office, there is a note, that this method of setting down causes according to priority of publication, prevented confusion, the great arrear of causes too often in this court, and much expence to the parties.

‡ The cost to be paid by the defendant, before he be admitted to shew cause against a conditional decree, in this court now, is five pounds, and the defendant should be served with the *subpoena* to hear judgment, eight days at least, before the day appointed for the hearing.

## A P P E N D I X.

upon such hearing, shall find cause to decree for the plaintiff yet the defendant shall have a day to shew cause against the same; but before he be admitted he shall pay down forty shillings \* cost, or such costs as the court shall order, and the order is to be penned accordingly. See page 396.

\* 902

\* *Injunctions on Possessory Bills, to restore and quiet Possessions.*

**RULE.**

*Injunction to  
quiet, &c. in  
what cases.*

*But not to hinder any extent,  
or prevent entry, &c. without special order  
and express words.*

By the 62d general Rule, injunctions to quiet possession will not be granted before hearing the cause, but upon oath made of an actual possession at the time of the bill exhibited in the plaintiff, or those under whom he claims, and for the space of three years before, and also upon satisfaction to the court out of the defendant's answer, or by other good manner that the title of the plaintiff is not determined. But no injunction without special order, and express words, ought to hinder any extent or execution actually upon the land, or to hinder the defendant's proceeding at common law to evict the plaintiff; nor for making any lease, peaceable entry, or fine distress for that end. To be between the 2d and 3d paragraphs page 310, but see page 311. 531. 533.

*All injunctions  
to be taken out  
in eight days.*

By the rules and practice of this court, all injunctions are to be taken out in eight days, and the party to be served therewith, and if taken out afterwards, they shall be set aside. See the 63d general rule, pa. 560, and the case of *Geoghegan against Geoghegan*, in this court, *Trin. 1742*, where this matter was settled upon full debate, and on the motion the case of *Cleland and Sheil* was mentioned, as a case, where the same point had been so determined in this court, in the year 1697, but upon the strictest search in the books of that year and of several years before and after, I could not find it.

*Injunction to  
the sheriff for  
the Mansion-  
House, on the  
first application.*

In the case of *Smyth guardian of Pendergast and others against O'Shaghnessy and others*, in the court of Chancery here, in October 1760, on a petition to the lords commissioners, (the Lord Chancellor being then in England) on a possessory bill and affidavits, an injunction was granted to the sheriff, to restore the plaintiff, as devisee of the estate in question, to the possession of the Mansion-house, out of which, it had been sworn, he had been forced by the defendant *O'Shaghnessy*. When

\* Now five pounds, as before.

## APPENDIX.

claimed under some old dormant title, not as heir at law; and injunction was also granted to the party, as to the demesne, unless cause should be shewn to the contrary, in the time prescribed by the order; afterwards, in Michaelmas term following, the defendant came to shew cause against the injunction to the party, and to set aside the injunction to the sheriff, upon a notice for that purpose; but as to the first point, the court allowed the cause. And as to the second point, the court refused to set aside the injunction, for that it is an order of course, and usually granted at the first instance, as the party returned \* out of his place of residence, and may not have a place to go to; and on these motions the several following points were determined;

\* 904

That the defendant should not read any affidavits to contradict the facts in the plaintiff's affidavits, or shew any other cause than appeared on the face of the plaintiff's affidavits. And it was urged, by the counsel for the plaintiff, that it is the constant course, in courts of equity here, on these applications, for injunctions to the party, not to suffer any affidavits to be read on the part of the defendant, but where there is an insufficiency, uncertainty, or defect, in the plaintiff's affidavit; besides, the injunction to the party is but as a summons, to put the matter in the way of trial. See before page 532, 533.

Affidavits are usually admitted to be read on the part of the defendant on an application for an injunction to the party, and why.

And in what cases they may.

It was also determined, that although the devisee had been a few days in possession, yet he was intitled to be restored upon a possessory bill, and might take up, and count upon the delivery of the devisor; as it was not pretended that the defendant was heir at law, nor was the heir at law a party, or in any way before the court.

A devisee may count upon the possession of his devisor, against a stranger, or person who is not the heir.

And upon the first motion, an objection was made to the reading of the affidavits, as they had been made before \* the possessory bill was filed; which objection was also over-ruled, the clerks having declared, it had been frequently done. And upon the second motion, Lord Chancellor declared, he would not go into that matter, as they had been read upon the first motion, and the order to shew cause being founded on it.

Affidavit may be read tho' made before the bill filed.

\* 905

And for the same reasons, his lordship also over-ruled another objection made by the defendant's counsel, as to reading an affidavit of one of the witnesses to the will, as to the execution of it. On this last objection, it was urged by the counsel for the plaintiff, that the inconveniences might be exceedingly great to a devisee, were he to wait for the proving of the will; that in the present case a title was sworn to, and the devisees

Affidavit read to prove the will of the devisor.

## A P P E N D I X.

devises to the plaintiff in the will, were set out in the affidavit.

Heir need not be a party, on a question before the court; but it was thought of no weight, for between the devisee and a stranger.

Devisee not to count on the possession of his devisor against the heir. Sed quer.

\* 906

It should seem that the heir is in a better condition by the determination, as he has only the will to combat with, and not O'Shaghnessy's title; and that the devisee could not have taken up, and counted upon the possession of the \* devisee against the heir at law, had the question been between them as he was admitted to do in this case against a stranger, who claimed under an old title, and not as heir at law. See before page 315.

It is well worth while to read the register's notes on this motion; it held several days, and was most learnedly debated.

Persons presented for resisting sheriffs, &c. in the execution of process for giving, &c. possessions of lands, guilty of felony and to be transported.

\* 907

By stat. 25 Geo. 2d. ch. 12. sect. 1. If any persons shall be presented by the Grand-Jury, at any assizes, or general quarter sessions of the peace, for having opposed, or aided the opposing, the execution of any process, for giving quieting the possession of any lands, and such presentment being returned to the clerk of the counsel; the persons in such presentment named shall, by proclamation from the Lord Lieutenant, or other governors and council, be proclaimed and in case such persons, so presented and proclaimed having opposed, or resisted, or aided in the opposing, or resisting, the execution of any such process, do not, within time to be limited in such proclamation, render themselves subject to the peace of the county where such presentment shall be made, they shall from thenceforth be convicted of felony, and transported to some of his majesty's plantations in America, as in cases of \* felony; and the court before which such persons shall be brought, shall have power to order such offenders to be transported for seven years; and all persons who shall knowingly conceal, aid, abet, or succour such persons, after the time they were so presented and proclaimed shall be guilty of felony, and shall be transported to some of his majesty's plantations in America, for the space of seven years.

The printed proclamation wherein persons are named for opposing execution of process shall be adjudged sufficient evidence against such persons.

And by sect. 2. the printed proclamation wherein such persons are named, to be presented by the Grand-Jury of the county, at the general assizes, or quarter sessions, to be guilty of the offences aforesaid, shall be adjudged a sufficient evidence of such persons.

## A P P E N D I X.

And by sect. 3. it is provided, that before any grand jury shall present any persons, as aforesaid, examinations shall be taken before some judge of the King's Bench, judge of assize, justice of the peace, upon oath; which examination shall be lodged with the clerk of the crown, or peace, for the county, or place where such persons shall be presented; and a copy thereof shall be certified, together with the presentment to the chief governors and council, before the persons, so presented, shall be proclaimed.

Examination  
shall be taken  
on oath before a  
judge of the  
King's Bench,  
&c. before any  
Grand Jury  
shall present  
persons, as  
aforesaid.

\* And by sect. 4. whenever a sheriff, or other officer duly authorized to execute any process of the law, for giving, quieting, or restoring of the possession of lands, shall be forcibly resisted, and prevented from executing the same, every person having right thereby to be quieted in, or restored to, their possessions, shall, from the time of such resistance and opposition, be deemed to be in the actual possession of such lands, fully as if the sheriff, or other officer, had duly executed the process, and shall be intitled to the rents, issues, and profits from the time of the giving of the judgment, or decree, in which such process was founded: And the payment of the rent for such lands becoming due from the time of such judgment, or decree, to any other persons, shall be void. And all rents accruing out of the same, and from the time of such judgment, or decree, are to be the property of the persons intitled to the possession under such judgment, or decree. And every person, who shall unlawfully keep possession of such lands, after the sheriff or other officer shall be prevented from executing such process, as aforesaid, shall respectively forfeit the persons, who ought to have been quieted or restored by such process, double the value of the rents of such lands, &c. on the time of pronouncing of the judgment, \* or decree, in which such process was founded, to be recovered by action, &c. in any of his majesty's courts, wherein no essoin, &c. shall be allowed.

\* 908  
Persons inti-  
tled to possession  
by judgment or  
decree, to be  
deemed in ac-  
tual possession  
from the time  
of such judg-  
ment, &c.  
where sheriffs,  
&c. are opposed  
in the execution  
of process for  
giving such  
possession.  
Payment of  
rents, &c. from  
the time of such  
judgment, &c.  
to any other  
person void.  
All growing  
rents to be the  
property of per-  
sons intitled to  
the possession  
under such  
judgments.  
Persons keeping  
possession from the time of

action, after such resistance, to forfeit double the value of the rents, &c. judgment, and how recoverable.

\* 909

And by sect. 5. this act shall continue five years, and to the end of the then next session of parliament.

The above act was continued for seven years, from the 1st of June, 1758, and to the end of the then next session of parliament, by stat. 31 Geo. 2d. ch. 9. sect. 9.

*Injunctions*

## APPENDIX.

### Injunctions to stop Proceedings at Law.

#### RULE.

Injunction on  
time to answer  
a *deditum*.

By the 17th general Rule *par*, where a *deditum* is prayed to take an answer in the country, or beyond seas, an injunction will be granted, by taking out an order of course, to stay the defendant's suit at law (if any be) till the answer comes in \*. To be between the 1st and 2d paragraph in page 549, & page 75, 76.

\* 910

No answer to  
be deemed filed,  
until the cost of  
process be paid.

### \* Process of Contempt.

By the 24th general Rule *par*, no answer shall be deemed to be filed, until the contempt be purged; and until the same shall be so purged, the plaintiff may prosecute the contempt notwithstanding any answer alledged to have been filed. In the second paragraph in page 790.

### Sequestration and Sequestrators.

Sequestrators to  
be paid for their  
trouble, and  
what.

In the case of the Attorney-General against *Carden* and others, on a hearing in this court, in *Trinity* term, 1760, a question arose, If sequestrators are intitled to be paid for their trouble, and counsellor *Roberts*, whose father had been deputy chief membrancer for many years, and who had himself acted the same office for several years, informed the court, that his father and himself had generally allowed the sequestrators one shilling in the pound for what they had received, including expences; but that these allowances have been varied, according to circumstances. See the case of *Watkins* and *Morrison*, this point, which has been depending several years in the court, and is not yet determined. I don't find, that in the court of *Chancery* there is any settled poundage, or other consideration, for their receipt; \* or, that either party, or a receiver (if appointed) are allowed any thing for their trouble, unless there be an order of the court for the purpose. By the civil law from whence this process (it is la-

\* 911

\* The general rule is, that if a defendant prays a *deditum*, the plaintiff shall enter a rule of course for an injunction; But in some special cases the court has granted the defendant a *deditum*, without an injunction, where a bill is brought against a suit at law, and the plaintiff is not ready for a trial before the bill is filed, or injunction prayed, in that case the court will not grant an injunction, till after verdict.

## A P P E N D I X.

was taken up by courts of equity, they were allowed both salary and expences. See pages 778, 779. Note, this cause is also before mentioned in page 6, to shew the preference which is to be given in this court to the king's busines. But for more on this last matter, see 4 Inst. 109. and the oath taken by the barons.

A sequestration is the first process against a peer, and upon a special contempt the sequestration shall issue immediately; but where it is for want of an answer, it is said, that the sequestration is to issue only in such time as it might issue against a person not intitled to privilege, and it seems reasonable that it should so issue immediately against a peer upon a special contempt, on account of the great advantage he hath, in this case, over every other person: for on a special contempt, an attachment shall issue even against a member of the house of commons, if privilege be not in, and he shall be taken into custody. See 1 Peere Williams 535. 2 Peere Williams 102. 385. and see the case of Bourke against lord Lisle, in the Chancery here, Michaelmas term 1760: But in this case, the sequestration, though awarded, \* was not to be taken out without further order, the counsel for the plaintiff agreeing thereto.

A sequestration  
the first process  
against a peer,  
and on a special  
contempt it is  
to issue immedi-  
ately.

\* 912

### Tithes.

Note, the bill which was prepared last sessions of parliament, for recovering Tithes by Civil Bill, and which is mentioned in page 234, did not pass into a law.

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L I S T  
OF THE  
GENERAL RULES  
OF THE  
COURT,

Which are numbered in the Court-Book, in the *Chief Remembrancer's Office*, with the Numbers thereof, as they are in the said Book, disposed under the several Heads to which they relate, with the Pages in which they are to be found in this Work.

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A.

*Abatement and Reviver.*

Rule 22. Page 4. 897.

*Advocacy.*

Rule 51. Page 800. 898.

*Banded Bills.*

Rule 15. Page 269.

P 2

*Answer*

914 *A List of the general Rules of the Court.*

*Answer.*

Rule 10. 16. 17. 21. 23. 24. 30. 81. 87. 88. Page  
73. 75. 84. 150. 382. 451. 452. 704. 706. bis, 899.

*Appearance.*

Rule 9. Page 169. 754.

*Articles to the Credit of Witnesses.*

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The following Case having happened since  
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and being special, it is thought proper to insert  
it here.

N the case of the Attorney General and others against *Redmond* and *Anne Dillon*, who were minors under the age of thirteen years, and had no guardian testamentary, or otherwise, (as appeared by affidavit) being served with a *subpoena* upon an information, neglected to appear, on which, attachments were entered against them in the usual manner directed How to proceed against infants who neglect to appear upon service of process.

the sheriff, and then a motion was made, that the tipstaff of the court, or the pursuivant, might be ordered to bring the defendants the minors up to court, that a guardian might be assigned for them, to appear and answer; but as it appeared at the defendants were not yet in custody of the sheriff to whom the process was directed, the court would make no rule to bringing up the minors, but on application of counsel, ordered the process to be changed to the county where the defendants lived; but it was mentioned by some of the old practitioners of the court, that the usual way is, to carry on the process to a serjeant at arms, or to apply for an order that the process may be directed to the pursuivant of the court, as the serjeant at arms and pursuivant are more immediately the officers of the court; but that in the latter case, a *non est inventus* must be first returned, on the first attachment, to the sheriff. In the court of *Chancery*, the process in these cases is always carried on to the serjeant at arms; but the pursuivant of that court can execute his process but within ten miles of the city of *Dublin*, unless upon special contempts. See page 15, 766, where it is said the sheriff, on such an attachment, is not obliged to bring up his prisoner to court, unless there be a special order for the purpose.

F I N I S

E. E. F. M.  
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